Supreme Court, U.S.
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No. __________

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE CARNEIL WEBSTER,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Bruce Carneil Webster, a federal prisoner under sentence of death, moved the Court of Appeals for the Fifth Circuit for authorization to file a successive application under 28 U.S.C. § 2255(h)(1) based on newly discovered evidence (recently released by the Social Security Administration) establishing that he is mentally retarded and therefore constitutionally ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Although the newly discovered evidence, as noted by the concurrence below, "virtually guaranteed that [Petitioner] would be found to be mentally retarded," the Fifth Circuit nonetheless held that it could not even "entertain the § 2255 motion in the first instance" because Petitioner had not satisfied the requirement of 28 U.S.C. § 2255(h)(1) that the new evidence "negate his guilt of the offense of which he was convicted, *i.e.*, capital murder."

The questions presented are:

I. May this Court review a decision by a court of appeals that it lacks jurisdiction to entertain a motion for authorization by a federal prisoner to file a successive application under 28 U.S.C. § 2255(h)(1) because the motion is based on newly discovered evidence of mental retardation establishing that the prisoner is constitutionally ineligible for execution under *Atkins*, rather than evidence that negates his guilt of the offense of which he was convicted.

II. Whether 28 U.S.C. § 2255(h)(1) allows a court of appeals to authorize a successive motion based on newly discovered evidence that shows by clear and convincing evidence that the petitioner is mentally retarded and therefore constitutionally ineligible for the death penalty, whether or not that new evidence also negates his guilt of the offense of which he was convicted.

III. Whether, if 28 U.S.C. § 2255(h)(1) does not allow a court of appeals to authorize a successive motion based on newly discovered evidence that shows by clear and convincing evidence that a petitioner is mentally retarded and therefore constitutionally ineligible for the death penalty, the statute is to that extent unconstitutional under *Atkins* and the Fifth and Eighth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all the parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 13

I. THIS COURT HAS JURISDICTION TO CONSIDER THE MERITS OF THIS PETITION. 15

  A. Certiorari Review Is Available from Decisions of the Court of Appeals, Absent an Express Bar 15

  B. This Court's Review of the Fifth Circuit's Decision Is Not Barred by 28 U.S.C. § 2244(b)(3)(E). 15

C. This Petition Seeks Review of the Fifth Circuit's Interpretation of Section 2255 and Its Conclusion that It Lacked Jurisdiction to Entertain the Motion for Authorization, Rather Than Its "Denial of Authorization.". 21

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS WHETHER, BY ENACTING AEDPA, CONGRESS INTENDED TO PRECLUDE A SUCCESSIVE MOTION BASED ON NEWLY DISCOVERED EVIDENCE THAT A PRISONER IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY – A MOTION THAT WOULD NOT HAVE BEEN BARRED PRIOR TO AEDPA............ 22

A. The Fifth Circuit's Narrow Construction Will Lead to an Unconstitutional Result. 24

B. In Enacting Section 2255, Congress Did Not Intend to Alter This Court's Rule That a Prisoner May Raise Newly Discovered Evidence of His Ineligibility For the Death Penalty in a Successive Motion.......... 25

C. Allowing a Prisoner to Raise Newly Discovered Evidence of Mental Retardation Pursuant to 28 U.S.C. § 2255(h)(1) Is Consistent with this Court's General Principles in Construing AEDPA. 29

D. The Circuits Are Split as to Whether Challenges to the Imposition of the Death Sentence May be Raised After AEDPA. 32

III. IF THE FIFTH CIRCUIT CORRECTLY CONSTRUED SECTION 2255(h)(1) AS PRECLUDING PETITIONER'S CLAIM, THE STATUTE IS, TO THAT EXTENT, UNCONSTITUTIONAL. 35

CONCLUSION 37

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit, *In re: Bruce Carneil Webster*, 605 F.3d 256 (2010) ....App. 1a

U.S. CONST. amend. V ....App. 1b

U.S. CONST. amend. VIII ....App. 1c

18 U.S.C. § 3596 .... App. 1d

28 U.S.C. § 2244 ....App. 1e

28 U.S.C. § 2254 .... App. 1f

28 U.S.C. § 2255 ....App. 1g

TABLE OF AUTHORITIES

CASES Page(s)

Adamo Wrecking Co. v. United States,
434 U.S. 275 (1978)..22

Atkins v. Virginia,
536 U.S. 304 (2002)..................................passim

Babbitt v. Woodford,
177 F.3d 744 (9th Cir. 1999), *cert. denied,*
526 U.S. 1107 (1999)......................................33

Burris v. Parke,
116 F.3d 256 (7th Cir. 1997).........................33, 34

Burris v. Parke,
130 F.3d 782 (7th Cir. 1997), *cert. denied,*
522 U.S. 990 (1997)....................................33, 34

Califano v. Yamasaki,
442 U.S. 682 (1979)..20

Castro v. United States,
540 U.S. 375 (2003)....................................21, 30

Crowell v. Benson,
285 U.S. 22 (1932)..25

Ford v. Wainwright,
477 U.S. 399 (1986)....................................35, 36

Grenada County Supervisors v. Brogden,
112 U.S. 261 (1884)..24

Herrera v. Collins,
506 U.S. 390 (1993)....................36

Hohn v. United States,
524 U.S. 236 (1998)....................15, 20

Holladay v. Allen,
555 F.3d 1346 (11th Cir. 2009)....................4

Holland v. Florida,
130 S. Ct. 2549 (2010)....................31

Hope v. United States,
108 F.3d 119 (7th Cir. 1997)....................32, 34

In re Dean,
341 F.3d 1247 (11th Cir. 2003)....................32, 34

In re Jones,
137 F.3d 1271 (11th Cir. 1998)....................33, 34

In re Medina,
109 F.3d 1556 (11th Cir. 1997), *cert. denied*, 520 U.S. 1151 (1997)....................33, 34

In re Vial,
115 F.3d 1192 (4th Cir. 1997)....................33

Kuhlmann v. Wilson,
477 U.S. 436 (1986)....................26, 30, 31

LaFevers v. Gibson,
238 F.3d 1263 (10th Cir. 2001)....................33

Marbury v. Madison,
5 U.S. 137 (1803)....................14

McCleskey v. Zant,
499 U.S. 467 (1991)..31, 32

Murray v. Carrier,
477 U.S. 478 (1986)..30

Panetti v. Quarterman,
551 U.S. 930 (2007)...................................... 30, 31

Rivera v. Quarterman,
505 F.3d 349 (5th Cir. 2007), *cert. denied*,
129 S. Ct. 176 (2008)..3

Roane, et al. v. Gonzales et. al.,
Case No. 1:05-cv-2337 (D.D.C. Feb. 16,
2007)...2

Russello v. United States,
474 U.S. 16 (1983)..20

Sanders v. United States,
373 U.S. 1 (1963)..30

Sawyer v. Whitley,
505 U.S. 333 (1992)....................................passim

Slack v. McDaniel,
529 U.S. 473 (2000)..31

Stewart v. Martinez-Villareal,
523 U.S. 637 (1998)..29, 30

Thompson v. Calderon,
151 F.3d 918 (9th Cir. 1998), *cert. denied*,
524 U.S. 965 (1998)....................................passim

United States v. Davis,
611 F. Supp. 2d 472 (D. Md. 2009) 4

United States v. Webster,
162 F.3d 308 (5th Cir. 1998), *cert. denied*,
528 U.S. 829 (1999) 7

United States v. Webster,
421 F.3d 308 (5th Cir. 2005), *cert. denied*,
549 U.S. 828 (2006) 9

Utah v. Evans,
536 U.S. 452 (2002) 20

Williams v. Taylor,
529 U.S. 420 (2000) 19

STATUTES

U.S. CONST. amend. V 1, 36

U.S. CONST. amend. VIII 1, 24, 36

18 U.S.C. §§ 1201 5

18 U.S.C. § 3596 .... 1, 5, 7

28 U.S.C. § 1254 .... 1, 15, 19

28 U.S.C. § 2244 .... passim

28 U.S.C. § 2254 .... passim

28 U.S.C. § 2255 .... passim

OTHER AUTHORITIES

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR* (4th ed. 2000) 6

Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary, 104th Cong. 87-88 (1995)....................19

J. Gregory Olley and Ann W. Cox, *Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II* (2d ed. 2008) 12

David Wechsler, *WAIS-III Administration and Scoring Manual* (3d ed. 2003) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce Carneil Webster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The Fifth Circuit's opinion is reported at 605 F.3d 256 and reproduced at Pet. App. 1a-12a.

JURISDICTION

The decision of the Fifth Circuit was entered on April 28, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The appendix reproduces the Fifth and Eighth Amendments to the U.S. Constitution, 18 U.S.C. § 3596(c), 28 U.S.C. § 2244, 28 U.S.C. § 2254, and 28 U.S.C. § 2255.

STATEMENT OF THE CASE

Petitioner sought authorization from the Fifth Circuit to file in the United States District Court for the Northern District of Texas a successive motion to vacate his death sentence under 28 U.S.C. § 2255.[1] Petitioner challenges his sentence of death based on newly discovered evidence that establishes he is mentally retarded and therefore categorically ineligible for the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

At a federal capital trial more than six years before *Atkins* was decided, Petitioner presented substantial and compelling evidence that he is mentally retarded.[2] That evidence included six scores from individually administered IQ examinations all within the range associated with mental retardation (scores of 48, 51, 55, 59, 65, and 72), the testimony of Petitioner's childhood friends and acquaintances, and three expert witnesses diagnosing Petitioner with mental retardation. In response, two government expert witnesses testified, without ever conducting a single complete IQ test, that Petitioner was faking and that his adaptive skills, as reflected by his ability to keep an orderly prison cell, were evidence of normal functioning. The government also presented the testimony of two witnesses who claimed that Petitioner had never been placed in special education classes in school. The trial court found, without explanation, that Petitioner "was not mentally retarded as matter of law," and he was sentenced to death.

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[1] Petitioner's sentence has been stayed in collateral litigation challenging the constitutionality of the federal lethal injection procedures. *See* Order, *Roane, et al. v. Gonzales et. al.*, Case No. 1:05-cv-2337 (D.D.C. Feb. 16, 2007) (Docket No. 27).

[2] In general, a diagnosis of mental retardation requires subaverage intellectual functioning, as well as significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. *Atkins*, 536 U.S. at 318.

Now, Petitioner has newly discovered evidence that establishes his mental retardation and directly refutes the evidence the government presented at trial to contest mental retardation. Newly discovered and released Social Security and school records – from a time prior to the commission of the crime – demonstrate IQ scores (59 and 69) and adaptive functioning well within the range of mental retardation, as well as explicit diagnoses of "mental retardation" (which necessarily evaluated Petitioner's adaptive functioning). The IQ tests and other examinations were performed by unbiased government physicians and psychologists tasked with weeding out fake disability claims, one of whom noted explicitly that there was no evidence that Petitioner was faking his condition. In addition, newly discovered records demonstrate that Petitioner had, in fact, been placed in special education classes.

Petitioner is mentally retarded. His lowest IQ score, 48, puts him at least three and one-third standard deviations below the mean, with an IQ higher than less than 0.1 percent of the population. *See* David Wechsler, *WAIS-III Administration and Scoring Manual* 24 (3d ed. 2003). Furthermore, Petitioner's IQ scores are significantly lower than the scores of prisoners recently found to be mentally retarded by the federal courts. *See, e.g.*, *Rivera v. Quarterman*, 505 F.3d 349, 362 (5th Cir. 2007) (IQ scores up to 92), *cert. denied*, 129 S. Ct. 176 (2008); *Holladay v. Allen*, 555 F.3d 1346, 1357 (11th Cir. 2009) (IQ scores up to 73); *United States v. Davis*, 611 F. Supp. 2d 472, 478 (D. Md. 2009) (IQ scores up to 76). The government has not identified, and counsel has not been able to find, any case decided since *Atkins* holding that a person with such consistently low IQ scores is *not* mentally retarded.

As the Fifth Circuit's concurrence found: "If the evidence [Petitioner] attempts to introduce here were ever presented to a judge or jury for consideration, it is virtually guaranteed that he would be found to be mentally retarded." Pet. App. 9a. The central question in this case is whether Petitioner will ever have the opportunity to present this newly discovered evidence because the evidence speaks to Petitioner's constitutional ineligibility for the death penalty rather than his factual guilt or innocence of the crime itself. The Fifth Circuit's decision squarely presents the question of whether Congress intended to preclude newly discovered evidence of categorical ineligibility for the death penalty – no matter how conclusive – from ever being raised in a successive motion. The Fifth Circuit's conclusion that Petitioner's newly discovered evidence must negate his guilt of the offense for which he was convicted reads the statutory language too narrowly and would be inconsistent with this Court's principle of interpreting statutes to avoid unconstitutional results.

Indeed, as the concurrence notes, the Fifth Circuit's interpretation of 28 U.S.C. § 2255(h) produces an "absurdity" and a "Kafkaesque result", and would require the courts to "condone . . . an unconstitutional punishment." Pet. App. 9a, 12a. The courts of appeals are divided on this important issue. This Court's review is not barred by the prohibition on review of motions for authorization brought by state prisoners, and is necessary to resolve an important question of federal and constitutional law.

1. At a trial in the Northern District of Texas more than six years before *Atkins* was decided, Petitioner was tried, convicted, and sentenced to death on a charge of kidnapping in which a death occurred in violation of 18 U.S.C. §§ 1201(a)(1) and (2).

At the sentencing phase, Petitioner attempted to prove that he was mentally retarded and therefore could not be executed under 18 U.S.C. § 3596(c). The evidence presented consisted primarily of testimony from various psychologists or psychiatrists who had administered IQ tests after Petitioner's incarceration. In particular, Petitioner presented evidence of a series of extremely low IQ scores as well as testimony from various doctors that Petitioner had the adaptive functioning of a seven-year-old and suffered from "mild"[3] mental retardation. In addition, Petitioner presented testimony from his family members and childhood friends regarding Petitioner's difficulties in functioning in daily life (commonly called "adaptive deficits"), including an inability to live on his own and function in the real world, communicate abstract thought, and write legibly.

In response, the government presented two experts to controvert a finding of mental retardation. Both of the government's witnesses examined Petitioner while he was incarcerated. They opined, without conducting their own complete IQ tests, that Petitioner was malingering and exaggerating his symptoms in order to secure a mental retardation defense. The government also introduced testimony that Petitioner had never been placed in special education classes and that he had learned to function well in prison.

Although four jurors decided that Petitioner "is or may be mentally retarded," the trial court, in a two-sentence decision, decided that Petitioner "was not mentally retarded as a matter of law," and Petitioner was sentenced to death. The trial court's decision contained no explanation for its "finding" on the issue of mental retardation; no indication of the standard for mental retardation being applied; and, in fact, no indication whether *any* standard at all was being applied. On direct appeal, the Fifth Circuit affirmed the district court, rejecting Petitioner's arguments that the trial court erred in making its mental retardation finding. *See United States v. Webster*, 162 F.3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999).

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[3] According to the American Psychiatric Association, "mild mental retardation" refers to individuals with an IQ in the range of 50-55 to approximately 70. This group constitutes about 85% of the population with mental retardation – by far the largest segment of individuals with the disorder. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV-TR* 42-43 (4th ed. 2000). Atkins' IQ scores put him in the range of the "mildly mentally retarded." *Atkins*, 536 U.S. at 308.

2. Petitioner then filed his initial Motion to Vacate Conviction and Sentence under 28 U.S.C. § 2255 ("2255 Motion") on September 29, 2000. Among other claims, he argued that he was ineligible for execution under 18 U.S.C. § 3596(c) because he is mentally retarded.

While his 2255 Motion was pending, Petitioner filed a Motion for Leave to Conduct Discovery on April 30, 2001. This motion requested discovery on several issues related to his mental retardation claim. Request for Discovery No. 8 specifically asked that the government "be required to produce . . . any reports prepared by a mental health professional in the Government's possession which, in any manner, questions or rebuts the testimony by the government's witnesses at trial (*i.e.*, Dr. Coons and Dr. Parker) on the issue of petitioner's mental retardation."[4] On June 18, 2002, the Northern District of Texas entered an order denying all requests for discovery and requiring

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[4] Trial counsel had earlier requested Petitioner's Social Security records, but the records were not released.

Petitioner to file an amended motion to vacate under 28 U.S.C. § 2255 within 60 days. The court concluded that because two of Petitioner's claims of mental retardation had been affirmed on direct appeal, additional discovery would not be permitted on those claims. The court further concluded that on the other two claims, Petitioner failed to show how additional discovery would contribute to his claims.[5]

The district court ultimately denied Petitioner's Amended 2255 Motion on September 30, 2003, affirming its previous finding that Petitioner is not mentally retarded. In rejecting his claim, the district court recognized that trial experts for the government and defense agreed that Petitioner's IQ scores fell consistently in the range of subaverage intellectual functioning associated with mental retardation, but that the experts "converged" on the issue of Petitioner's adaptive skills. The court denied all of Petitioner's claims as well as his request for an evidentiary hearing.

3. Petitioner applied for certificates of appealability from the district court on each of the 16 grounds raised in his Amended 2255 Motion, including the court's denial of his request for additional discovery on his mental retardation claim. The district court granted certificates of appealability only on (1) whether sufficient evidence

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[5] Had the court granted the Request for Discovery No. 8, among others, the government would have been required to turn over the Social Security records which are a significant part of the new evidence Petitioner now seeks to present in his successive motion.

supported the district court's finding that Petitioner was not mentally retarded, and (2) whether the government is required to prove a capital defendant is not mentally retarded. On appeal, the Fifth Circuit again affirmed the trial court's finding on mental retardation. *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005), *cert. denied*, 549 U.S. 828 (2006).

4. On October 21, 2009, Petitioner moved the Fifth Circuit for authorization to file a successive motion to vacate his death sentence under 28 U.S.C. § 2255(h)(1). The motion was based on the fact that, although substantial evidence of Petitioner's mental retardation had been presented at trial, newly discovered evidence now clearly and convincingly establishes that Petitioner is mentally retarded – under the definition of mental retardation widely accepted by the courts today and widely accepted by the medical field both now and at the time of trial. The newly discovered evidence directly contradicts and undercuts the government's case at trial that Petitioner was faking his IQ tests and that his adaptive functioning was normal.

The newly discovered evidence presented to the Fifth Circuit includes Social Security records, which, though requested long before the trial, were not released by the government (the Social Security Administration) until recently (February 2009). The records reflected examinations performed by government physicians and psychologists when Petitioner was 20, a year *before* the commission of the crime. Of the six individually administered IQ tests admitted into evidence at trial, only one had been administered before commission of the crime.

In 1993, more than a year before his indictment for the offense of conviction, Petitioner had applied for Social Security benefits, claiming a disabling condition of sinus problems and headaches. In order to determine whether he was eligible for Social Security benefits based on this claim, the Social Security Administration had Petitioner evaluated by three separate medical professionals. Each doctor independently diagnosed Petitioner as having an extremely low IQ and/or having mental retardation. First, Dr. Rittelmeyer diagnosed Petitioner as suffering from "[m]ental retardation." Pet. App. 9a. Then, Dr. Spellman described Petitioner as "a slow fellow who did not know much and did not know how to communicate well." Pet. App. 9a-10a. Explaining that he had found "no evidence of exaggeration or malingering," Dr. Spellman found that Petitioner's IQ was 69 or lower and concluded that his significant cognitive difficulties were attributable not to mental illness but to "mental retardation." Pet. App. 10a. Finally, Dr. Hackett performed an IQ test and concluded that Petitioner's IQ was 59. Dr. Hackett described Petitioner as "mildly retarded," "antisocial," and unable to "function well in the work place." Pet. App. 10a.

Unlike the limited, post-incarceration examinations performed by the government's trial witnesses, the diagnoses in the Social Security records were based on administration of applicable examinations when Petitioner was 20 years old, well before he committed the crime at issue in this case. In addition, because the newly discovered diagnoses were made before Petitioner was incarcerated and expressly conclude that there is no evidence of malingering, they refute the government's suggestion that Petitioner was faking later IQ tests in order to secure a mental retardation defense.

The newly-released Social Security records also contain previously unavailable evidence that Petitioner in fact was enrolled in special education classes. A letter from the Special Education Supervisor for the Watson Chapel Schools, Lou Jackson, explains that there were records pertaining to Petitioner's placement in special education classes, but that these records had been destroyed in 1988. This new evidence directly contradicts the testimony of two Watson Chapel Schools representatives offered by the government at trial, each of whom had suggested that Petitioner had not been placed in special education classes and therefore did not meet the definition of mentally retarded.

Finally, Petitioner also sought to present new testimony discussing the manifestation of his mental retardation prior to age 18. This testimony revealed evidence that Petitioner was unable to care for himself, including his inability to tie his shoes and dress himself. Additional new evidence demonstrates Petitioner's inability to understand simple language concepts and basic tasks. There is also new evidence regarding Petitioner's performance in school, which goes to his adaptive deficit in functional academics. Importantly, the new evidence illustrates that Petitioner's adaptive deficits existed before incarceration, in contrast to the government's evidence on adaptive deficits which was based on Petitioner's ability to function in prison.[6]

5. a. The Fifth Circuit denied Petitioner's motion for authorization, holding that it did not have jurisdiction to entertain the application under 28 U.S.C. § 2255(h). Pet. App. 8a n.8. Reading the language of section 2255(h)(1) narrowly, the court concluded that "a petitioner cannot bring a successive claim under § 2255(h)(1) where he does not assert that the newly discovered evidence would negate his guilt of the offense of which he was convicted, *i.e.*, capital murder." Pet. App. 4a. The court concluded that such a result is "compelled by the plain language of § 2255(h)(1), which does not encompass challenges to a sentence." Pet. App. 4a. The court noted that while a reading of "offense" that would "cover not only a claim that a prisoner is not guilty of the offense of conviction but also a claim that he is merely 'not guilty of the death penalty' . . . accords with prior habeas corpus law interpreting 'actual innocence' to include 'innocence of the death penalty[,]' . . . there is no reason to believe that Congress intended the language 'guilty of the

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[6] Experts in the field discredit statements about an individual's ability to function in prison because the structured nature of the environment does not provide a true test of an individual's abilities. *See, e.g.*, J. Gregory Olley and Ann W. Cox, ***Assessment of Adaptive Behavior in Adult Forensic Cases: The Use of the Adaptive Behavior Assessment System-II***, 20 (2d ed. 2008).

offense' to mean 'eligible for a death sentence.'" Pet. App. 4a-5a.

b. Judge Wiener concurred in the opinion but wrote separately to emphasize the "absurdity of the Kafkaesque result: Because [Petitioner] seeks to demonstrate only that he is constitutionally ineligible for the death penalty – and not that he is factually innocent of the crime – we must sanction his execution." Pet. App. 9a. Surveying the evidence presented in the motion, Judge Wiener concluded that "it is virtually guaranteed" that Petitioner would be found mentally retarded if the newly discovered evidence could be considered on the merits, but noted that "we must turn a blind eye to this evidence, as it speaks to [Petitioner's] constitutional eligibility for the death penalty and not his factual innocence of the crime." Pet. App. 9a, 11a. Judge Wiener further stated that although he concurred in the majority's opinion "as a correct statement of the law, I continue to harbor a deep and unsettling conviction that, albeit under Congress's instruction which ties our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment." Pet. App. 11a-12a.

REASONS FOR GRANTING THE PETITION

In *Atkins*, this Court determined, conclusively and categorically, that a sentence of death cannot be constitutionally carried out against the mentally retarded. The Fifth Circuit, however, interpreted 28 U.S.C. § 2255(h)(1) as requiring it "to condone just such an unconstitutional punishment" despite newly discovered, clear and convincing proof that Petitioner is mentally retarded. That determination merits review by this Court.

As a threshold matter, this Court *can* consider the merits of the petition. First, the bar imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA") to this Court's review of denials of motions for authorization brought by *state* prisoners pursuant to 28 U.S.C. § 2254 does not apply to Petitioner, who is a *federal* prisoner challenging his sentence under section 2255. In any event, Petitioner seeks review not of a "denial of authorization" based on the merits of the *evidence* presented in the motion, but instead of the Fifth Circuit's holding that it lacked jurisdiction even to consider evidence of categorical ineligibility of the death penalty. It is this Court's duty to say what the law is, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), and this Court should do so here on this important statutory and constitutional question of the meaning of 28 U.S.C. § 2255(h)(1).

On the central question, the Fifth Circuit's holding rests on an interpretation of AEDPA that too narrowly construes the statutory text and would in Petitioner's case lead to the unconstitutional execution of a mentally retarded person. The courts of appeals are in conflict on this narrow but vitally important issue, which is likely to recur whenever newly discovered evidence establishing any categorical exclusion from the death penalty is raised by a prisoner.

I. THIS COURT HAS JURISDICTION TO CONSIDER THE MERITS OF THIS PETITION.

A. Certiorari Review Is Available from Decisions of the Courts of Appeals, Absent an Express Bar.

"Cases in the courts of appeals may be reviewed by the Supreme Court . . . [b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1). Here, Petitioner seeks review of the Fifth Circuit's order denying authorization to file a successive motion under 28 U.S.C. § 2255(h)(1). The denial of authorization by the court of appeals constitutes a "case" for purposes of the availability of certiorari review. *See Hohn v. United States*, 524 U.S. 236, 241 (1998) (noting that a proceeding seeking relief for a "wrongful detention in violation of the Constitution" constitutes a case). Accordingly, absent an express congressional intent to bar this Court's review, this Court has certiorari jurisdiction to consider the merits of this petition.

B. This Court's Review of the Fifth Circuit's Decision Is Not Barred by 28 U.S.C. § 2244(b)(3)(E).

Petitioner anticipates that the government will argue 28 U.S.C. § 2244(b)(3)(E) bars this Court's review of his petition. While section 2244(b)(3)(E) bars this Court's review of a circuit court's grant or denial of an authorization to file a second or successive application made by *state* prisoners under 28 U.S.C. § 2254, its terms do not, on their face, bar this Court's review of a grant or denial of an authorization to file a second or successive application made by *federal* prisoners, like Petitioner, under 28 U.S.C. § 2255.

This Court has never squarely addressed whether the restriction in section 2244(b)(3)(E) applies to federal prisoners. The question is important because there is uncertainty about whether Congress intended to allow greater review of federal petitions than state petitions, and the question will persist until this Court addresses it. Applying the canons of statutory construction, the Court should conclude it has the authority to review denials of authorization sought by federal prisoners.

Section 2244 addresses second or successive habeas petitions. With the exception of subsection (a), section 2244 by its express terms applies only to applications brought by state prisoners under section 2254. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 [which applies to state prisoners] . . . ."); 28 U.S.C. § 2244(b)(2) (same); 28 U.S.C. § 2244(c) ("In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court . . . ."); 28 U.S.C. § 2244(d)(1) (noting the limitations period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court").

Section 2244(a), on the other hand, expressly references individuals who are detained "pursuant to a judgment of a court of the United States," and states that a circuit or district court judge need not entertain an application for a second or successive application "except as provided in section 2255." 28 U.S.C. § 2244(a). On its face, section 2244(a) thus states that a federal prisoner seeking to bring a second or successive motion must satisfy the requirements of section 2255, not section 2254. Indeed, section 2255(h) sets forth a separate standard for federal prisoners seeking to bring a second or successive motion, namely, that there exists either (i) newly discovered evidence that would render the movant not guilty of the offense; or (ii) a new rule of constitutional law. *See* 28 U.S.C. § 2255(h). While section 2255 sets forth the standard to be met in order to obtain authorization to file a successive motion, section 2255 does not set forth the procedure by which an applicant is to seek authorization. Instead, section 2255 states that the "second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h).

Subsections 2244(b)(3)(A)-(C) set forth the certification procedure by which "a second or successive application permitted by this section is filed in the district court." 28 U.S.C. § 2244(b)(3)(A). That procedure includes the requirement that the applicant first move in the appropriate court of appeals for an order authorizing the district court to consider the application, *see* 28 U.S.C. § 2244(b)(3)(A); the requirement that a three-judge panel of the court of appeals determine the motion, *see* 28 U.S.C. § 2244(b)(3)(B); and the requirement that the court of appeals consider whether the applicant has made a *prima facie* showing that the application satisfies the requirements of the subsection, *see* 28 U.S.C. § 2244(b)(3)(C).

Congress thus clearly intended federal prisoners to follow the same procedure as state prisoners in seeking the required certification. But, Congress did *not* expressly incorporate the bar to this Court's *review* of such certifications found in section 2244(b)(3)(E). Section 2244(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari," and clearly bars review of certification decisions regarding state prisoners. As noted above, however, the plain language of section 2255(h), which adopts for federal prisoners the section 2244 state prisoner certification procedures, provides only that a "second or successive [federal prisoner] motion *must be certified* as provided in section 2244;" there is no adoption or incorporation of the parts of section 2244 that do not address the procedure *for* certification. *See* 28 U.S.C. § 2255(h) (emphasis added). The *standards* for federal prisoner certification are not adopted from section 2244 (they are set forth in section 2255(h)), and neither are the provisions regarding whether a certification once made may be *reviewed.* Only the procedures for how a motion "must be certified" in the first instance are incorporated. In short, section 2255 – the section exclusively applicable to federal prisoners – incorporates parts of section 2244, but not subsection 2244(b)(3)(E), the subsection which bars further review. With no explicit bar to this Court's review, the usual provisions of 28 U.S.C. § 1254(1) govern.

This plain language reading is not inconsistent with the purpose of AEDPA "to further the principles of comity, finality, and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Though the legislative history surrounding AEDPA is sparse, it appears from the debates that Congress was most often focused on balancing the need for finality in judgments and federalism with the need for full constitutional review by federal judges who are likely to be further removed from the community than local state judges. *See, e.g., Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary*, 104th Cong. 87-88 (1995) (prepared statement of Nicholas deB. Katzenbach, former Attorney General of the U.S., on behalf of the Emergency Committee to Save Habeas Corpus). This Court's review on writ of certiorari of a circuit court's denial of certification to file a second or successive section 2255 motion does not implicate the federalism or comity concerns implicated in federal court review of state court judgments.

Further, under the well-known interpretative canon, *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of the other"), Congress's explicit decision to bar this Court's review of the court of appeals' denial of authorization to file a second or successive application by state prisoners under 28 U.S.C. § 2254 demonstrates that it did not intend to bar this Court's review of the court of appeals' denial of authorization to file a second or successive application by federal prisoners under 28 U.S.C. § 2255. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted). Indeed, as this Court has recognized in an analogous situation, "a Congress concerned enough to bar [the Court's] jurisdiction in one instance would have been just as explicit in denying it in the other, were that its intention." *Hohn*, 524 U.S. at 250 (contrasting requirements for certificates of appealability and motions for second or successive applications for habeas corpus relief).

Finally, this Court "read[s] limitations on [its] jurisdiction to review narrowly," and generally declines to "read into a statute an unexpressed congressional intent to bar jurisdiction." *See Utah v. Evans*, 536 U.S. 452, 463 (2002); *cf. Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) ("Absent the clearest command to the contrary from Congress, federal courts retain their equitable power. . . .").

C. This Petition Seeks Review of the Fifth Circuit's Interpretation of Section 2255 and Its Conclusion that It Lacked Jurisdiction to Entertain the Motion for Authorization, Rather Than Its "Denial of Authorization."

In any event, section 2244(b)(3)(E) does not bar this Court's certiorari jurisdiction over the Petitioner's claim because the subject of this petition is not the Fifth Circuit's *application* of section 2255(h)(1), but whether the Fifth Circuit's *interpretation* of that statute itself is correct. As the Fifth Circuit made clear, it did not evaluate the evidence presented by Petitioner to determine whether, for example, it was "newly discovered" or whether it was "substantive" because it believed it lacked jurisdiction to do so as a result of its too-narrow construction of section 2255(h)(1).[7] Pet. App. 8a n.8.

There is a difference, as this Court has recognized, when the "subject" of a certiorari petition is the denial of authorization and when the "subject" is the lower courts' improper *interpretation* of a statutory provision that controls the authorization decision. *Castro v. United States*, 540 U.S. 375, 380 (2003). Even if a federal statute bars judicial review of a decision on a particular issue, judicial review may nonetheless sometimes be required to the extent that review is necessary to clarify a disagreement about the proper interpretation of a legal term within the controlling statute. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85 (1978).

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[7] "Our decision that the instant motion is beyond the reach of § 2255 is jurisdictional in nature, going to the ability of the district court and this court to entertain the § 2255(h) motion in the first instance." Pet. App. 8a n.8.

Thus, regardless of whether the motion for authorization is brought by a state or a federal prisoner, section 2244(b)(3)(E) does not bar certiorari review of the court of appeals' interpretation of provisions establishing its own gatekeeper "jurisdiction." This Court can and should review the Fifth Circuit's conclusion that, under section 2255(h)(1), it lacked jurisdiction even to consider the evidence presented by Petitioner. Therefore, the "subject" of this certiorari petition is the Fifth Circuit's improper interpretation of the term "guilty of the offense," not the application of the statute to the particular facts of Petitioner's case.

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS WHETHER, BY ENACTING AEDPA, CONGRESS INTENDED TO PRECLUDE A SUCCESSIVE MOTION BASED ON NEWLY DISCOVERED EVIDENCE THAT A PRISONER IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY - A MOTION THAT WOULD NOT HAVE BEEN BARRED PRIOR TO AEDPA.

The question before the Fifth Circuit was whether Petitioner had made a prima facie showing of "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). The Fifth Circuit's narrow interpretation of the language "guilty of the offense" is inconsistent with prior habeas law and would lead to an unconstitutional and literally fatal result here.

The question whether Congress intended the phrase "[not] guilty of the offense" in 28 U.S.C. § 2255(h)(1) to eliminate the pre-AEDPA concept of "innocence of the death penalty" is cleanly presented by this case. This was the *only* question addressed by the Fifth Circuit. And as the concurrence makes clear, because the new evidence would "virtually guarantee[]" a finding that Petitioner is mentally retarded, rarely if ever will the facts present that question as starkly as it is raised here.

This Court should review this case to address this critical issue which will arise when a prisoner under sentence of death discovers new evidence of categorical ineligibility (such as mental retardation or juvenile status) for the death penalty. Importantly, there is confusion in the lower courts in related contexts under sections 2244 and 2255. As discussed below, the courts of appeals are split as to whether the phrase "not guilty of the offense" in 28 U.S.C. § 2255(h)(1) was intended to alter the pre-AEDPA jurisprudence of this Court. Moreover, prior to the Fifth Circuit's decision, no court had ever interpreted the language of section 2255(h)(1) to preclude a prisoner from raising a successive motion alleging newly discovered evidence which made him *categorically* ineligible for the death penalty.

Finally, if this Court were to conclude that Congress really did intend to preclude such a claim, then the Court should address the issue whether section 2255(h)(1) is to that extent unconstitutional because, as Judge Wiener noted in his concurrence below, such a statutory bar would result in an unconstitutional punishment here.

A. The Fifth Circuit's Narrow Construction Will Lead to an Unconstitutional Result.

The Fifth Circuit's narrow construction of section 2255(h)(1) will lead to an unconstitutional result, namely, the execution of a mentally retarded individual in contravention of the Eighth Amendment. Rather than construing the language as the Fifth Circuit did, however, this Court can and should interpret section 2255(h)(1) to avoid that result by concluding that Congress intended to allow federal prisoners to bring a second or successive motion if it presents newly discovered evidence that clearly and convincingly demonstrates a categorical ineligibility for the death penalty.

It is a fundamental principle of this Court's jurisprudence that an act of Congress should not be construed as unconstitutional if any other possible construction remains. *See Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269 (1884) ("Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution."); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). Thus, if a federal statute may be read two ways, the Court should construe the statute in the manner that avoids rendering it unconstitutional.

In order to interpret section 2255(h)(1) in a way that avoids an unconstitutional result in this case, the Court should interpret the language to allow a federal prisoner to present newly discovered evidence that he is categorically ineligible for the death penalty. As shown below, and contrary to the Fifth Circuit's holding, such an interpretation is a fairly possible reading of section 2255(h)(1), and would avoid the unconstitutional execution that will result under the Fifth Circuit's reading of the statute.

B. In Enacting Section 2255, Congress Did Not Intend to Alter This Court's Rule That a Prisoner May Raise Newly Discovered Evidence of His Ineligibility For the Death Penalty in a Successive Motion.

Prior to the enactment of AEDPA, this Court had articulated an "actual innocence exception" to the bar arising from the doctrine of "abuse of the writ" against bringing claims in a successive habeas application. *See Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). As the Fifth Circuit acknowledged, this "actual innocence" exception included the concept of "innocence of the death penalty" where a prisoner could show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law. Pet. App. 4a-5a; *Sawyer v. Whitley,* 505 U.S. 333, 336 (1992). The question here, as the Fifth Circuit recognized, is whether Congress intended to alter this concept in enacting AEDPA; or whether it intended the phrase "[not] guilty of the offense" to include the concept of "actual innocence," but not "innocence of the death penalty." Pet. App. 4a-5a.

Using the canons of statutory construction,[8] the Ninth Circuit has concluded that Congress' use of the phrase "not guilty of the *underlying* offense" (the standard that a state prisoner must satisfy to bring a successive habeas application) in 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added) does not indicate an intention to alter the pre-AEDPA jurisprudence. *Thompson v. Calderon,* 151 F.3d 918, 924 (9th Cir.) (en banc), *cert. denied*, 524 U.S. 965 (1998). As that court noted, section 2244(b)(2)(B)(ii) applies to all successive state-prisoner petitions raising a new claim, regardless of whether the petitioner was under sentence of death:

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[8] There is no evidence in the legislative history that, in enacting AEDPA, Congress intended to alter the *Sawyer* principle.

> However, unlike *Sawyer,* the standard in § 2244(b) applies to all habeas petitions, not just capital habeas petitions. For that reason, it would not have made sense for Congress to adopt, without any changes, the *Sawyer* standard referring to eligibility "for the death penalty," since the statute would have to apply to cases where the petitioner did not receive the death penalty. Thus, the need to cover non-capital habeas petitions best explains the slight difference in wording between the *Sawyer* "actual innocence" standard and § 2244(b)(2)(B)(ii).

Id. at 923-24.[9] Like section 2244(b)(2)(B)(ii), section 2255(h)(1), applies to all federal prisoners attempting to file a successive motion, not just those under sentence of death.

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[9] As noted above, *Thompson* dealt directly with the phrase "guilty of the *underlying* offense" as it appears in section 2244(b)(2)(B)(ii) (emphasis added). To the extent there is any material difference between that phrase and "guilty of the offense" in section 2255(h)(1), the latter is the broader phrasing, and that difference cuts in Petitioner's favor here. Petitioner is not challenging his conviction of murder (in a sense, murder is the "underlying" offense to "capital murder" because "capital murder" is a murder for which a death sentence may be imposed). But he is asserting that he cannot be "guilty" of (*i.e.*, susceptible to punishment for) "capital" murder, and to that extent is indeed saying he cannot be "guilty of the offense" of capital murder insofar as that would permit his execution.

Further, Petitioner fits into the *Sawyer* paradigm. Petitioner here was convicted of "capital murder," rather than "merely homicide." *Id.* at 924. "Capital murder" is a crime which carries with it the possibility of a sentence of death. If a petitioner presents new evidence of his mental retardation demonstrating his categorical ineligibility for the death sentence, then the offense no longer carries with it the possibility of a sentence of death. Such a petitioner has, in substance, challenged the basis for "*capital* murder."

Indeed, this Court recognized that the very reasons that the mentally retarded are ineligible for the death penalty relate not just to sentencing but also to their ability to participate in their defense of the crime of which they are accused. As the Court noted, the "reduced capacity of mentally retarded offenders" hinders them from providing an effective defense. *Atkins*, 536 U.S. at 320. In the aggregate, the mentally retarded "face a special risk of wrongful execution" because they are more likely to give false confessions and less able to give meaningful assistance to their counsel. *Id.* at 321. Their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," *id.* at 318, enhances the prospect that a capital sentence "will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 320 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)). They are typically poor witnesses, they have more difficulty presenting evidence of mitigating factors when presented with aggravating factors, and their demeanor may create an "unwarranted impression of lack of remorse for their crimes." *Id.* at 321. The Court explained that Atkins himself received a capital sentence because the jury viewed his trial testimony as less "coherent and credible" than his co-defendant's. *Id.* at 307.

Thus, for the above reasons this Court laid out in ***Atkins*** and those the Ninth Circuit set forth in ***Thompson***, evidence of mental retardation does address whether a federal death row prisoner is "not guilty of the offense" of capital murder. And here, although Petitioner is not attempting to challenge the entirety of his "murder" conviction, he is challenging the "capital" (i.e., eligible for the death penalty) part of that conviction.

C. Allowing a Federal Prisoner to Raise Newly Discovered Evidence of Mental Retardation Pursuant to 28 U.S.C. § 2255(h)(1) Is Consistent with this Court's General Principles in Construing AEDPA.

In interpreting AEDPA's provisions, this Court has noted its willingness to look to the "implications for habeas practice." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). No doubt recognizing the significance of reading AEDPA too narrowly, this Court has expressly avoided interpreting the statute in a way that would "produce troublesome results," "create procedural anomalies," and "close [the Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent."

Castro v. United States, 540 U.S. at 380-81; *see also Panetti v. Quarterman*, 551 U.S. 930, 946 (2007) (eschewing a literalist interpretation of section 2244(b) in favor of a functional competency rule that avoided "troublesome results" and that did not "close [federal courts] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent"); *Martinez-Villareal*, 523 U.S. at 644 (rejecting literal reading of section 2244(b) to avoid "perverse" results). These principles also counsel in favor of a reading of section 2255(h)(1) that would permit certification of Petitioner's claim of categorical ineligibility for the death penalty here.

Such an approach also comports with this Court's "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977)); *see also Sanders v. United States*, 373 U.S. 1, 18-19 (1963) (creating a presumption in favor of entertaining successive claims for federal prisoners even though the statute appeared to support an opposing inference); *Kuhlmann*, 477 US. at 449, 451-52 (applying "the ends of justice" exception to successive claims, even though Congress had eliminated the exception from section 2244(b) in 1966).

In addition, this Court has repeatedly recognized that AEDPA's language is not "self-defining" but rather "takes its full meaning from [the Court's] case law, including decisions predating the enactment of the [AEDPA]." *Panetti*, 551 U.S. at 943-44. As the Court recently stated, AEDPA seeks to eliminate delays in the federal habeas review process "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law." *Holland v. Florida,* 130 S. Ct. at 2549, 2562 (2010); *see also Slack v. McDaniel,* 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."). "When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland,* 130 S. Ct. at 2562 (citing *Slack,* 529 U.S. at 483).

Among the fundamental pre-AEDPA principles the Court has always recognized is an "ends of justice" exception to the abusive and successive petitions rules. *See McCleskey v. Zant,* 499 U.S. 467, 494-95 (1991) (recognizing an "ends of justice" gateway for "abusive"[10] claims); *Kuhlmann,* 477 U.S. at 454 (plurality opinion) (same for successive claims). That is, even when a petitioner either did or could have raised a claim before, this Court recognized an exception allowing the Court to address the merits of the claim when it is necessary to serve the ends of justice. *See McCleskey*, 499 U.S. at 494.

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[10] In the habeas context, "abuse of the writ" may be applied to bar previously-available claims which a petitioner failed to raise in a prior habeas petition. *McCleskey*, 499 U.S. at 490. Because the evidence that would be presented in Petitioner's successive motion is newly-discovered, and was previously unavailable, due, in part, to the district court's denial of Petitioner's request for discovery, the abuse of the writ doctrine does not apply to Petitioner's claims.

All these principles counsel against the narrow reading applied to section 2255(h)(1) by the Fifth Circuit here, which would require the "absurd[]," "Kafkaesque," and "illogical[]" result of "condon[ing] . . . an unconstitutional punishment." Pet. App. 9a, 12a (Wiener, J., concurring). And not just any such punishment, but a fatal one.

D. The Circuits Are Split as to Whether Challenges to the Imposition of the Death Sentence May be Raised After AEDPA.

Whether Congress intended to allow prisoners to challenge not only their conviction, but also their death sentence (as under *Sawyer*), is a question that has divided the circuit courts and will continue to cause confusion until this Court resolves it. The Seventh Circuit has held, in a non-capital case, that the "actual innocence" exception did not survive the AEDPA amendments to 28 U.S.C. § 2255. *See Hope v. United States*, 108 F.3d 119, 119-120 (7th Cir. 1997) (concluding that "a successive motion under 28 U.S.C. § 2255 . . . may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence"). The Eleventh Circuit has reached a similar conclusion, also in a non-capital case. *See In re Dean*, 341 F.3d 1247, 1248-49 (11th Cir. 2003) (rejecting a federal prisoner's claim in a non-capital case that the "guilty of the offense" language of section 2255(h) allowed the prisoner to present newly discovered evidence – a copy of an order reversing two previous state convictions – to prove that the prisoner's sentence was improperly enhanced on the basis of his prior criminal history). The Seventh and Eleventh Circuits have also concluded that, even in capital cases, state prisoners seeking to bring a successive motion under section 2244 must present newly discovered evidence related to "whether or not the applicant is 'guilty of the underlying offense' – not to claims related to sentence." *In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998); *see also Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997) (same); *Burris v. Parke*, 130 F.3d 782, 785 (7th Cir. 1997) (same), *cert. denied*, 522 U.S. 990 (1997); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir. 1997) (same), *cert. denied*, 520 U.S. 1151 (1997), *overruled on other grounds by Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

Other circuits have either expressly concluded that AEDPA allows a prisoner to present newly discovered evidence relating to a death sentence or have at least left open the possibility. In particular, the Ninth Circuit has concluded that § 2244(b)(2)(B)(ii) permits challenges brought by state prisoners to a death sentence. *See Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir. 1999), *cert. denied*, 526 U.S. 1107 (1999); *Thompson*, 151 F.3d at 923. The Fourth and the Tenth Circuits, on the other hand, have left open the question "whether, under the AEDPA, an individual subject to a sentence of death may assert . . . that he is 'innocent' of the death penalty." *In re Vial*, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997); *cf. LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting that the court need not decide whether § 2244(b)(2)(B)(ii) applies to challenges to a death sentence made by a state prisoner under 28 U.S.C. § 2244).

In this case, the Fifth Circuit concluded that the plain language of section 2255(h)(1) demonstrates that Congress did not intend to incorporate the "old, broad interpretation of actual innocence." Pet. App. 7a. That conclusion is not the only permissible reading of the "plain language," as noted above, and none of the cases upon which the Fifth Circuit relied for its decision involved a similar situation. Those cases holding that a federal prisoner cannot challenge his sentence based on newly discovered evidence under 28 U.S.C. § 2255(h)(1) were not decided in the capital context. *See Hope*, 108 F.3d at 120; *In re Dean*, 341 F.3d at 1248-49. Those cases concluding that newly discovered evidence relating to a death sentence cannot provide a basis for a successive motion have all been in the context of state prisoners, for whom the applicable statute refers to the "underlying offense." *See In re Jones*, 137 F.3d at 1273; *Burris*, 116 F.3d at 258; *Burris*, 130 F.3d at 785; *In re Medina*, 109 F.3d at 1565. And none of the courts have considered whether newly discovered evidence that the prisoner is *categorically* excluded from the death penalty on constitutional grounds would allow the prisoner to bring a successive motion under 28 U.S.C. § 2255(h)(1).

III. IF THE FIFTH CIRCUIT CORRECTLY CONSTRUED SECTION 2255(h)(1) AS PRECLUDING PETITIONER'S CLAIM, THE STATUTE IS, TO THAT EXTENT, UNCONSTITUTIONAL.

If the Fifth Circuit's reading of section 2255(h)(1) is correct, the result will be the execution of a mentally retarded individual without due process in contravention of the Eighth and Fifth Amendments. Under the Fifth Circuit's reading of the statute, even though Petitioner has newly discovered, clear and convincing evidence of his mental retardation – so compelling that the concurrence concluded it was "virtually guaranteed" that Petitioner would be found mentally retarded if the merits could be considered – a court must ignore such evidence and condone "an unconstitutional punishment." Pet. App. 9a, 12a.

There can be no question that Petitioner has a liberty interest in avoiding an unconstitutional execution. This Court has stated that "the condemned prisoner . . . has not lost the protection of the Constitution altogether;" therefore, "if the Constitution renders the fact or timing of [the prisoner's] execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). This Court has also recognized that a prisoner's constitutional eligibility for the death penalty is an important "life" interest, which must be determined "with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.* Under the Fifth Circuit's reading, Section 2255(h) creates an obvious risk of deprivation of protecting this "life" interest, because it eliminates any safety valve, even a very narrow one, for a post-conviction court to avoid executions which are "virtually guaranteed" to be unconstitutional. As the Fifth Circuit concurrence said, "under Congress's instruction which ties our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment." Pet. App. 11a-12a.

As shown above, prior law (pre-AEDPA) allowed a prisoner in Petitioner's circumstance to show by newly discovered evidence that he was "actually innocent" of the death penalty. *Sawyer*, 505 U.S. at 336. This Court may not yet have decided that the Constitution prevents the execution of someone who is "actually innocent," *Herrera v. Collins*, 506 U.S. 390, 417 (1993), but it has decided that the Constitution categorically prevents the execution of one who is mentally retarded. *Atkins*, 536 U.S. at 321. If AEDPA really does prevent the courts from hearing such a claim and requires them to condone the execution of one who is mentally retarded, then to that extent it permits the "infliction" of a "cruel and unusual punishment" and itself violates the Eighth Amendment; it also deprives the Petitioner of life without due process of law in violation of the Fifth Amendment. This Court need not reach that question because section

2255(h)(1) need not be so read, but if it is so read, then this Court should so hold.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 27, 2010

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[11] Alternatively, the Court should remand the case to the Fifth Circuit to consider in the first instance whether section 2255(h)(1) is unconstitutional because that court's holding implicates the constitutional question under *Atkins*.

APPENDIX TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Fifth Circuit, *In re: Bruce Carneil Webster*, 605 F.3d 256 (2010) .... App. 1a

U.S. CONST. amend. V .... App. 1b

U.S. CONST. amend. VIII .... App. 1c

18 U.S.C. § 3596 .... App. 1d

28 U.S.C. § 2244 .... App. 1e

28 U.S.C. § 2254 .... App. 1f

28 U.S.C. § 2255 .... App. 1g

United States Court of Appeals
Fifth Circuit
FILED
April 28, 2010

Lyle W. Cayce
Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-11039

In re: BRUCE CARNEIL WEBSTER,

Movant.

On Motion for Authorization to File
Successive 28 U.S.C. § 2255 Motion
in the United States District Court
for the Northern District of Texas

Before SMITH, WIENER, and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Bruce Webster moves for an order authorizing the district court to consider a successive motion to vacate his federal death sentence under 28 U.S.C. § 2255, as amended by section 105 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Because he does not meet the procedural requirements of § 2255(h), we deny the motion.

I.

In June 1996, Webster was sentenced to death for his role in the kidnapping and brutal murder of a sixteen-year-old girl. He filed a direct appeal of his conviction, including among his nineteen assignments of error a challenge to the district court's finding that he was not mentally retarded. We affirmed in all respects. *United States v. Webster*, 162 F.3d 308, 358 (5th Cir. 1998), *cert. denied* 528 U.S. 829 (1999). He then filed for relief under § 2255, which motion the district court denied, concluding that, even in the wake of *Atkins v. Virginia*, 536 U.S. 304 (2002), the evidence supported a finding that Webster was not mentally retarded. *Webster v. United States*, No. 4:00-CV-1646-Y, 2003 WL 23109787, at *14 (N.D. Tex. Sept. 30, 2003). And, after the district court granted a certificate of appealability on two of the issues concerning mental retardation, we again affirmed the sentence. *United States v. Webster*, 421 F.3d 308, 310 (5th Cir. 2005), *cert. denied*, 549 U.S. 828 (2006).

Now Webster asks for another chance to argue that he is mentally retarded and therefore ineligible for the death penalty.[1] Specifically, he contends that in light of newly discovered evidence – in the form of government and school records and additional testimony – no reasonable factfinder could conclude that he is not mentally retarded.

II.

Section 2255(h) governs the filing of second or successive motions:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –
>
> > (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> >
> > (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

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[1] Webster's execution is stayed for reasons not related to the instant motion.

This court has not had occasion to consider whether a petitioner seeking only to challenge his eligibility for the death penalty can do so under § 2255(h)(1).[2] We now conclude that a petitioner cannot bring a successive claim under § 2255(h)(1) where he does not assert that the newly discovered evidence would negate his guilt of the offense of which he was convicted, *i.e.*, capital murder.

That result is compelled by the plain language of § 2255(h)(1), which does not encompass challenges to a sentence. Instead, it states that a petitioner wishing to rely on newly discovered evidence (as distinguished from being able to point to a qualifying new rule of constitutional law)[3] to support a second § 2255 motion must "establish by clear and convincing evidence that no reasonable fact-finder would have found the movant *guilty of the offense*." § 2255(h)(1) (emphasis added).

Webster nevertheless urges us to read "offense" broadly so that § 2255(h)(1) would cover not only a claim that a prisoner is not guilty of the offense of conviction but also a claim that he is merely "not guilty of the death penalty." Such an interpretation accords with prior habeas corpus law interpreting "actual innocence" to include "innocence of the death penalty." *Cf. Sawyer v. Whitley*, 505 U.S. 333, 340-41 (1992). But, as Judge Posner cogently explained,

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[2] Nor have we had occasion to consider that question with regard to 28 U.S.C. § 2244(b)(2)(B)(ii), which includes the same language. Section 2255 governs collateral attacks on federal convictions; § 2244, attacks on state court convictions. Nevertheless, "[b]ecause of the similarity of the actions under [these sections], they have traditionally been read in *pari materia* where the context does not indicate that would be improper." *United States v. Flores*, 135 F.3d 1000, 1002 n.7 (5th Cir. 1998).

[3] See § 2255(h)(2).

> Courts that before the amendment had to decide whether an application for postconviction relief came within the "actual innocence" exception to the requirement of proving cause and prejudice in order to be permitted to revive a waived ground for relief extended the exception to sentencing issues . . . . But we do not think the exception survives the amendment. The "actual innocence" exception of the prior law was judge-made, and so its contours were appropriately judge-fashioned and permissibly judge-expanded. The exception in the new law is graven in statutory language that could not be any clearer. When we consider . . . the absence of any indication in the legislative history that 'offense' was being used in some special sense different from its ordinary meaning, we think it highly unlikely that Congress intended the word to bear a special meaning.

Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997) (Posner, J.).[4]

That is to say, there is no reason to believe that Congress intended the language "guilty of the offense" to mean "eligible for a death sentence."[5] Had Congress wanted the provision to cover challenges to a sentence – even if only to a death sentence – it easily could have referenced sentences explicitly in the text, as it did numerous times throughout

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[4] *See also In re Dean*, 341 F.3d 1247, 1248-49 (11th Cir. 2003); *In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998); *Burris v. Parke*, 130 F.3d 782, 785 (7th Cir. 1997); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1565-66 (11th Cir. 1997), *overruled on other grounds by Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Two other circuits addressed the issue but avoided deciding it. *See LaFevers v. Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) ("[T]here is a split among the three circuits that have addressed the question . . . . This court need not resolve that difficult question . . . ."); *In re Vial*, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997) (en banc) ("We need not address the question of whether, under the AEDPA, an individual subject to a sentence of death may assert the existence of new evidence establishing that the sentence was imposed improperly, *i.e.*, that he is "innocent" of the death penalty.").

[5] By this we do not mean to suggest that a prisoner is jurisdictionally barred from seeking successive review where he contests a factual predicate of his capital murder conviction, without which he would have been guilty only of non-capital murder. *Cf. Thompson v. Calderon*, 151 F.3d 918, 923-24 (9th Cir. 1998) (en banc).

§ 2255.[6] Or if Congress had intended to signal courts to incorporate the old, broad interpretation of actual innocence, it well could have used the words, "actual innocence."[7] Instead, it elected to couch § 2255(h)(1), as well as § 2244(b)(2)(B)(ii), in the markedly different, unmistakable terms of *guilt of the offense.* Absent some indication that Congress meant for the language in § 2255(h)(1) not to be taken literally, we decline to interpret it any other way.

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[6] *Cf., e.g.*, 28 U.S. C. § 2255(b) ("If the court finds that the judgment was rendered without jurisdiction, or that *the sentence imposed* was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner *or resentence him* or grant a new trial *or correct the sentence* as may appear appropriate. (Emphasis added.)).

[7] Or, indeed, "eligible for the death penalty," per *Sawyer*, 505 U.S. at 336. *See Thompson*, 151 F.3d at 923 (noting that the difference between the language in *Sawyer* and the language in § 2244(b)(2)(B)(ii) could suggest that Congress chose to deviate from it).

In summary, Webster's application does not satisfy § 2255(h)(1), and § 2255(h)(2) is inapplicable. The motion for authorization to file a successive § 2255 motion is DENIED.[8]

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[8] Our decision that the instant motion is beyond the reach of § 2255 is jurisdictional in nature, going to the ability of the district court and this court to entertain the § 2255 motion in the first instance. The result makes it unnecessary for this court to address whether, as the government claims, the evidence that Webster seeks to introduce is neither newly discovered nor substantive.

WIENER, Circuit Judge, concurring:

I concur in the majority opinion, as I believe that it is a correct interpretation of 28 U.S.C. § 2255(h), but I write separately to emphasize the absurdity of its Kafkaesque result: Because Webster seeks to demonstrate only that he is constitutionally ineligible for the death penalty – and not that he is factually innocent of the crime – we must sanction his execution.

If the evidence that Webster attempts to introduce here were ever presented to a judge or jury for consideration on the merits, it is virtually guaranteed that he would be found to be mentally retarded. In 1993 – more than a year before his indictment for the offense of conviction – Webster applied for Social Security benefits.[1] To determine his eligibility for those benefits, three separate government physicians performed medical and psychological examinations on him. Notably, all three physicians independently concluded that Webster is mentally retarded. First, Dr. Rittelmeyer diagnosed Webster as suffering from "[m]ental retardation." Then, Dr. Spellman described Webster as "a slow fellow who did not know much and did not know how to communicate well." Explaining that he had found no evidence of exaggeration or malingering during his examination, Dr. Spellman concluded that Webster's IQ was 69 or lower and that his significant cognitive difficulties were attributable not to mental illness but to "mental retardation." Finally, Dr. Hackett performed an IQ test and concluded that Webster's IQ was 59. Dr. Hackett described Webster as "mildly retarded," "antisocial," and unable to "function well in the work place."

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[1] Although Webster's counsel requested these Social Security records long before his trial, they were only recently produced. And, when Webster sought additional discovery in connection with his first habeas petition, the district court denied his motion – just two days before the Supreme Court's landmark decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) – and required that he file his petition within sixty days, i.e., less than two months after *Atkins* was decided and without the benefit of additional discovery.

These reports, the merits of which have never been considered by any judge or jury, refute much of the evidence introduced by the government at the penalty phase of Webster's trial. For example, the government's physicians – all of whom examined Webster while he was incarcerated for the offense of conviction – suggested that he was malingering and exaggerating his symptoms in the hopes of being found ineligible for the death penalty. In contrast, none of the Social Security physicians who diagnosed Webster's mental retardation many years earlier noted any such evidence. Moreover, at trial, the government introduced testimony that Webster had never been placed in special education classes, which weighed further still against a finding of mental retardation. Again, though, the Social Security records tell a different story. Specifically, a letter to the Social Security Administration from Lou Jackson, the Special Education Supervisor for the Watson Chapel Schools, indicates that Webster was indeed enrolled in special education classes but that the records of his enrollment there were destroyed in 1988 after his family did not respond to a letter "telling them they could have the records if they wanted them."[2] Under § 2255(h), however, we must turn a blind eye to this evidence, as it speaks to Webster's constitutional eligibility for the death penalty and not his factual guilt or innocence of the crime.

The Supreme Court explained in *Atkins v. Virginia* that because mentally retarded persons suffer from "disabilities in areas of reasoning, judgment, and control of their impulses, they do not act with the level of *moral culpability* that characterizes the most serious adult criminal conduct."[3] Thus, "in the light of our evolving standards of decency," the Court held that the Eighth Amendment prohibits as excessive the execution of mentally retarded defendants.[4] Although I concur in the majority's opinion as a correct statement of the law, I continue to harbor a deep and unsettling conviction that, albeit under Congress's instruction which ties our judicial hands so illogically, we today have no choice but to condone just such an unconstitutional punishment.

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[2] Of course, this is all in addition to the already substantial evidence of mental retardation that Webster introduced before the trial court, including, *inter alia*, testimony from Doctor Finn that Webster's IQ was 59; testimony from Dr. Keyes that Webster had an IQ of 51 with the adaptive functioning of a seven-year-old; testimony from Dr. Cunning that Webster suffered from mild mental retardation; and testimony from several witnesses familiar with Webster's adaptive deficits in communication, conceptual skills, home living, functional academics, and day-to-day life.

[3] 536 U.S. at 320 (emphasis added).

[4] *Id.*

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

18 U.S.C. § 3596. Implementation of a sentence of death

(a) In General.— A person who has been sentenced to death pursuant to this chapter shall be committed to the custody of the Attorney General until exhaustion of the procedures for appeal of the judgment of conviction and for review of the sentence. When the sentence is to be implemented, the Attorney General shall release the person sentenced to death to the custody of a United States marshal, who shall supervise implementation of the sentence in the manner prescribed by the law of the State in which the sentence is imposed. If the law of the State does not provide for implementation of a sentence of death, the court shall designate another State, the law of which does provide for the implementation of a sentence of death, and the sentence shall be implemented in the latter State in the manner prescribed by such law.

(b) Pregnant Woman.— A sentence of death shall not be carried out upon a woman while she is pregnant.

(c) Mental Capacity.— A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it was imposed on that person.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b) **(1)** A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) **(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) **(1)** A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

> **(A)** the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> **(B)** the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> **(C)** the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> **(D)** the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) **(1)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) **(i)** there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) **(1)** In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> **(3)** the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized

by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

174 3

No. 10-150

In the Supreme Court of the United States

BRUCE CARNEIL WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review by writ of certiorari the court of appeals' denial of petitioner's request for authorization to file a second or successive collateral attack under 28 U.S.C. 2255.

2. Whether, under 28 U.S.C. 2255(h)(1) (Supp. II 2008), a defendant may file a second or successive Section 2255 motion based on newly discovered evidence that pertains not to his guilt but to his eligibility for the death penalty.

3. Whether, if Section 2255(h)(1) bars a defendant from challenging his death sentence in a second or successive Section 2255 motion based on newly discovered evidence that he is mentally retarded, the statute is to that extent unconstitutional under the Fifth or Eighth Amendment.

TABLE OF CONTENTS

Page
Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Adamo Wrecking Co. v. *United States*, 434 U.S. 275 (1978) 16
Atkins v. *Virginia*, 536 U.S. 304 (2002) 8, 24, 29
Babbitt v. *Woodford*, 177 F.3d 744 (9th Cir.), cert. denied, 526 U.S. 1107 (1999) 19
Burris v. *Parke*:
  130 F.3d 782 (7th Cir.), cert. denied, 522 U.S. 990 (1997) 18
  116 F.3d 256 (7th Cir. 1997) 19
Cabana v. *Bullock*, 474 U.S. 376 (1986), overruled in part on other grounds by *Pope* v. *Illinois*, 481 U.S. 497 (1987) 21
Calderon v. *Thompson*, 523 U.S. 538 (1998) 15
Castro v. *United States*, 540 U.S. 375 (2003) 15, 16
Davenport, In re, 147 F.3d 605 (7th Cir. 1998) 16
Davis, In re, 130 S. Ct. 1 (2009) 17
Dixon v. *United States*, 548 U.S. 1 (2006) 21
Felker v. *Turpin*, 518 U.S. 651 (1996) 17, 28
Ford v. *Wainwright*, 477 U.S. 399 (1986) 29

Cases—Continued: Page

Greenawalt v. *Stewart*:

105 F.3d 1268 (9th Cir.), cert. denied, 519 U.S. 1102 (1997), abrogated on other grounds, *Rhines* v. *Weber*, 544 U.S. 269 (2005) 18, 20

105 F.3d 1287 (9th Cir.), cert. denied, 519 U.S. 1103 (1997) 18

Harbison v. *Bell*, 129 S. Ct. 1481 (2009) 29

Hope v. *United States*, 108 F.3d 119 (7th Cir.), cert. denied, 515 U.S. 1132 (1997) 23

Jones, In re, 137 F.3d 1271 (11th Cir. 1998) 18

LaFevers v. *Gibson*, 238 F.3d 1263 (10th Cir. 2001) 19

Leonard v. *United States*, 383 F.3d 1146 (10th Cir. 2004) 16

Magwood v. *Patterson*, 130 S. Ct. 2788 (2010) 17

Medina v. *California*, 505 U.S. 437 (1992) 21

Medina, In re, 109 F.3d 1556 (11th Cir. 1997), cert. denied, 520 U.S. 1151 (1997) 18

Morris v. *Dretke*, 413 F.3d 484 (5th Cir. 2005) 24

Panetti v. *Quarterman*, 551 U.S. 930 (2007) 23

Pope v. *Illinois*, 481 U.S. 497 (1987) 21

Rhines v. *Weber*, 544 U.S. 269 (2005) 18

Roper v. *Simmons*, 543 U.S. 551 (2005) 29

Sawyer v. *Whitley*, 505 U.S. 333 (1992) 22

Schlup v. *Delo*, 513 U.S. 298 (1995) 22

Slack v. *McDaniel*, 529 U.S. 473 (2000) 23

Sonshine, In re, 132 F.3d 1133 (6th Cir. 1997) 16

State v. *Grell*, 135 P.3d 69 (Ariz. 2006), cert. denied, 550 U.S. 937 (2007) 21

Stewart v. *LaGrand*, 526 U.S. 115 (1999) 29

Cases—Continued: Page

Stewart v. *Martinez-Villareal*, 523 U.S. 637 (1998) .. 18, 23

Thompson v. *Calderon*, 151 F.3d 918 (9th Cir.), cert. denied, 524 U.S. 965 (1998) 11, 19, 22

Tison v. *Arizona*, 481 U.S. 137 (1987) 28

Triestman v. *United States*, 124 F.3d 361 (2d Cir. 1997) 13, 16

United States v. *Davis*, 611 F. Supp. 2d 472 (D. Md. 2009) 21

United States v. *Hall*, 152 F.3d 381 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999) 5

United States v. *Lorentsen*, 106 F.3d 278 (9th Cir. 1997) 16

United States v. *Webster*:

  162 F.3d 308 (5th Cir. 1998), cert. denied, 528 U.S. 829 (1999) .... *passim*

  392 F.3d 787 (5th Cir. 2004) 9

  421 F.3d 308 (5th Cir. 2005), cert. denied, 549 U.S. 828 (2006) .... *passim*

Utah v. *Evans*, 536 U.S. 452 (2002) 15

Vial, In re, 115 F.3d 1192 (4th Cir. 1997) 19

Walker v. *True*, 399 F.3d 315 (4th Cir. 2005) 21

Ward v. *Hall*, 592 F.3d 1144 (11th Cir. 2010), petition for cert. pending, No. 10-288 (filed Aug. 25, 2010) 18

Webster v. *Doe*, 486 U.S. 592 (1988) 15

Webster v. *United States*, No. 4:00-CV-1646, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003) 2, 6, 7, 8, 26, 27

Constitution and statutes: Page

U.S. Const.:
  Amend. V (Due Process Clause) 28, 29, 30
  Amend. VIII 8, 21, 28, 29, 30
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
  § 105, 110 Stat. 1220 9, 15
  § 106(a), 110 Stat. 1220 14
Federal Death Penalty Act of 1994, 18 U.S.C. 3591 *et seq.* 4
  18 U.S.C. 3591(a) 28
  18 U.S.C. 3591(a)(2) 4, 28
  18 U.S.C. 3592(c) 4
  18 U.S.C. 3592(c)(6) 5
  18 U.S.C. 3592(c)(9) 5
  18 U.S.C. 3592(c)(11) 5
  18 U.S.C. 3593(c) 5
  18 U.S.C. 3593(d) 5
  18 U.S.C. 3593(e) 5
  18 U.S.C. 3595(c) 6, 7, 8, 9, 20
  18 U.S.C. 3599(e) 29
18 U.S.C. 924(c) (1994) 2
18 U.S.C. 1201(a) (1994) 20
18 U.S.C. 1201(a)(1) (1994) 2
18 U.S.C. 1201(c) 2
28 U.S.C. 1254(2) 17
28 U.S.C. 2241 17
28 U.S.C. 2244 12, 13, 14
28 U.S.C. 2244(a) 14
28 U.S.C. 2244(b)(1) 14

Statutes—Continued: Page

28 U.S.C. 2244(b)(2) 14

28 U.S.C. 2244(b)(2)(B)(ii) 18, 19, 20, 22

28 U.S.C. 2244(b)(3)(A) 13, 14

28 U.S.C. 2244(b)(3)(B) 12, 13, 14

28 U.S.C. 2244(b)(3)(C) 12, 13, 14

28 U.S.C. 2244(b)(3)(D) 12, 13, 14

28 U.S.C. 2244(b)(3)(E) 12, 13, 15, 16, 17

28 U.S.C. 2244(c) 14

28 U.S.C. 2244(d)(1) 14

28 U.S.C. 2254(e)(2)(B) 18

28 U.S.C. 2255 (Supp. II 2008) . . . . *passim*

28 U.S.C. 2255(a) (Supp. II 2008) 23

28 U.S.C. 2255(b) (Supp. II 2008) 23

28 U.S.C. 2255(e) (Supp. II 2008) 17, 28

28 U.S.C. 2255(e)(2)(B) (Supp. II 2008) 18

28 U.S.C. 2255(f)(4) (Supp. II 2008) 27

28 U.S.C. 2255(h) (Supp. II 2008) 10, 12, 13

28 U.S.C. 2255(h)(1) (Supp. II 2008) . . . . *passim*

28 U.S.C. 2255(h)(2) (Supp. II 2008) 9

Miscellaneous:

Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearings Before the S. Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) 15

In the Supreme Court of the United States

No. 10-150

BRUCE CARNEIL WEBSTER, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-12a) is reported at 605 F.3d 256. The opinion of the court of appeals affirming petitioner's conviction and sentence is reported at 162 F.3d 308. The opinions of the court of appeals reviewing and affirming the denial of petitioner's first motion for postconviction relief are reported at 392 F.3d 787 and 421 F.3d 308.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2010. The petition for a writ of certiorari was filed on July 27, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1); as explained below, however, this Court lacks jurisdiction to review the decision of the court of appeals. See pp. 12-17, *infra*.

STATEMENT

Following a jury trial in the Northern District of Texas, petitioner was convicted of kidnapping resulting in death, in violation of 18 U.S.C. 1201(a)(1) (1994); conspiring to commit kidnapping, in violation of 18 U.S.C. 1201(c); and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c) (1994). He was sentenced to death on the charge of kidnapping resulting in death. The court of appeals affirmed, *United States* v. *Webster*, 162 F.3d 308 (5th Cir. 1998), and this Court denied a petition for a writ of certiorari, 528 U.S. 829 (1999). Petitioner then filed a motion for postconviction relief under 28 U.S.C. 2255.[1] The district court denied the motion, *Webster* v. *United States*, No. 4:00-CV-1646, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003); the court of appeals affirmed, *United States* v. *Webster*, 421 F.3d 308 (5th Cir. 2005); and this Court denied a petition for a writ of certiorari, 549 U.S. 828 (2006). Thereafter, petitioner sought authorization from the court of appeals to file a second Section 2255 motion. The court of appeals denied the request. Pet. App 1a-12a.

1. The evidence at trial showed that in 1994 petitioner, along with Orlando Hall and Marvin Holloway, was running a marijuana trafficking operation in Pine Bluff, Arkansas. They bought marijuana in the Dallas-Fort Worth area with the assistance of Steven Beckley, who transported the marijuana to Arkansas. Hall and Beckley gave two Dallas drug dealers, Neil Rene and Stanfield Vitalis, $4700 for marijuana to be delivered later. Rene and Vitalis failed to appear with the marijuana and later claimed in a phone conversation that they had been robbed of the money and their car. When Orlando Hall subsequently saw the two men enter the

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[1] All references to Section 2255 are to the 2008 supplement.

car that they claimed had been stolen, he concluded that they had lied about being robbed. 162 F.3d at 317-318.

A few days later, on September 24, 1994, petitioner, Beckley, Orlando Hall, and his brother Demetrius Hall, all dressed in camouflage clothing, drove to the apartment in Arlington, Texas, from which Rene and Vitalis had telephoned. Petitioner and Orlando Hall were armed with handguns, Demetrius Hall carried a small baseball bat, and Beckley had duct tape and a jug of gasoline. After Rene's 16-year-old sister, Lisa, refused them entry and called the police, petitioner forcibly entered the house, tackled Lisa, and dragged her into the car. The group then changed cars; while they drove around, with petitioner in the front passenger seat and Beckley at the wheel, Orlando Hall raped Lisa in the back seat and forced her to perform oral sex on him. 162 F.3d at 318.

After dropping off Orlando Hall, the group drove to a motel in Pine Bluff. En route, petitioner and Demetrius Hall took turns raping Lisa. At the motel, the group kept Lisa tied to a chair and raped her repeatedly. 162 F.3d at 318.

The next day, Orlando Hall and Holloway arrived at the motel and took Lisa into the bathroom for 15 to 20 minutes. Orlando Hall told Beckley, "She know too much." Petitioner and Orlando Hall went to a park and dug a grave. They and Beckley took Lisa to the park that night, but returned when they could not find the gravesite in the dark. 162 F.3d at 318.

The next morning, petitioner, Orlando Hall, and Beckley drove Lisa back to the park. Petitioner and Orlando Hall led the way to the gravesite, while Beckley guided Lisa, masked and barefoot, by the shoulders. At the gravesite, Orlando Hall turned Lisa's back to the grave and placed a sheet over her head. He then hit her in the head with a shovel. She screamed and started running. Beckley grabbed her and hit her twice in the head with a shovel. Petitioner and Orlando Hall then took turns with the shovel, beating Lisa into unconsciousness. Petitioner proceeded to gag Lisa and drag her into the grave. He stripped her, covered her naked body with gasoline, and shoveled dirt back into the grave. Although she was unconscious, Lisa likely was still breathing when petitioner put her in the grave, *i.e.*, she died after she was buried alive. 162 F.3d at 318-319.

When police arrested petitioner, he was carrying a key to the motel room in which Lisa had been held. He admitted involvement in the kidnapping and the murder. He led authorities to the gravesite, to the charred bucket that he admitted using to burn Lisa's clothes, and to the place where he burned them. He told an FBI agent that the murder had not been personal but "strictly business." 162 F.3d at 319, 320 n.5, 333, 336 & n.26.

Before trial, the government provided notice of its intent to seek the death penalty on the kidnapping count. The jury found petitioner guilty of kidnapping resulting in death, conspiring to commit kidnapping, and using and carrying a firearm during a crime of violence. 162 F.3d at 319.

2. The trial then proceeded to the penalty phase. Under the Federal Death Penalty Act of 1994 (FDPA), 18 U.S.C. 3591 *et seq.*, before a jury may sentence a defendant to death, it must find the existence of at least one of the "intent" factors enumerated in 18 U.S.C. 3591(a)(2), to ensure that the defendant acted with a degree of culpability sufficient to justify the death penalty, and at least one of the aggravating factors enumerated in 18 U.S.C. 3592(c). If the jury finds that those requirements are satisfied, then it may also consider any non-statutory aggravating factors for which the govern-

ment has provided notice and presented proof beyond a reasonable doubt. The jury then weighs the statutory and non-statutory aggravating factors that it has found to exist against any mitigating factors that any individual juror finds to exist by a preponderance. 18 U.S.C. 3593(c) and (d). The jury is to return a death sentence if it finds that all the aggravating factors found to exist "sufficiently outweigh" all the mitigating factors found to exist that a sentence of death is justified. 18 U.S.C. 3593(e).

In this case, the jury found unanimously that the government had proved beyond a reasonable doubt the requisite intent factor. The jury also found beyond a reasonable doubt three statutory and two non-statutory aggravating factors: that petitioner committed the offense in an especially heinous, cruel, and depraved manner in that the offense involved torture or serious physical abuse; that the offense was committed with substantial planning and premeditation; that Lisa was a particularly vulnerable victim due to her age; that petitioner constituted a future danger to the lives and safety of others; and that the offense had affected the victim's family. 162 F.3d at 319 n.1; 18 U.S.C. 3592(c)(6), (9) and (11). The defense submitted numerous mitigating factors, and nine of them were found to exist by at least one juror. 162 F.3d at 319 n.2. Four jurors found as one mitigating factor that petitioner "is or may be mentally retarded." *Ibid.*

The jury found unanimously that the aggravating factors sufficiently outweighed the mitigating factors to justify a death sentence. See 162 F.3d at 320.[2]

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[2] Orlando Hall was tried separately and also sentenced to death. See *United States* v. *Hall*, 152 F.3d 381 (5th Cir. 1998), cert. denied, 526 U.S. 1117 (1999).

3. In addition, 18 U.S.C. 3596(c) exempts from the death penalty defendants who are mentally retarded or who, because of a mental disability, lack the mental capacity to understand the death penalty or why it was imposed. At the penalty phase, petitioner argued that he is mentally retarded and, in support, presented testimony from four medical experts regarding his mental capacity and the testimony of a fifth medical expert on surrebuttal to critique the methodology used by the government's experts in testing his cognitive abilities. He also submitted voluminous evidence of the abuse he suffered as a child. See 421 F.3d at 309.

The government presented two medical experts who concluded that petitioner was not mentally retarded. Although the government experts agreed that petitioner has a low I.Q., they concluded that petitioner's I.Q. was higher than petitioner's experts had suggested and, more importantly, that petitioner had sufficient adaptive skills to preclude classifying him as mentally retarded. 421 F.3d at 312-313; 2003 WL 23109787, at *14. The government's experts noted that petitioner had scored higher on intelligence tests administered before this case began, and that he had an incentive not to perform well on the tests administered after his arrest. Furthermore, the government's experts explained that petitioner's experts' testing methodology "was critically flawed and misleading," 421 F.3d at 310, because petitioner's immersion in a criminal subculture and lack of formal education likely resulted in deceptively low scores on the I.Q. and adaptive-skills tests used by petitioner's experts (which, for instance, asked petitioner to define "inflation" and to recognize a picture of Mark Twain). See *id.* at 310, 313 nn.13 & 15; 2003 WL 23109787, at *12-*13, *14. And petitioner's experts had based their conclusions on family members' statements that petitioner lacked certain skills; the government experts "effectively [rebutted] some of those findings with direct evidence that Webster has adapted to his environment and does possess skills that his family stated that he did not." *Id.* at *14. For instance, petitioner had shown adaptability by working as a drug dealer; by burning his clothes to destroy evidence after the murder; by concocting cover stories and making excuses to the police when he was arrested in possession of a key to the motel room in which Lisa Rene had been held and repeatedly raped; and by sneaking into the women's section of the jail in which he was held (apparently for sexual gratification). See 421 F.3d at 313 & n.15. The government also presented other witnesses who testified that petitioner performed adequately while at school and that, while in custody, petitioner wrote letters to other inmates; received and read aloud from newspapers; appeared to be reading and taking notes from books in the law library; prepared written grievances and wrote request slips for various services; submitted names and addresses of people for his visitation list; and complained because he received the incorrect change from the prison commissary. See *id.* at 310, 313 n.15.

After imposing the death sentence, the district court entered a finding under Section 3596(c) that petitioner is not mentally retarded and therefore not exempt on that basis from the death penalty. See 421 F.3d at 309-310.

4. On direct appeal, petitioner contended, among many other claims, that the district court's finding that he is not mentally retarded was against the weight of the evidence. The court of appeals rejected the claim, observing that "[t]he government presented substantial evidence to support the finding" on mental retardation.

162 F.3d at 353. The court added that "only four of the twelve jurors found that [petitioner] is or may be mentally retarded and that he suffers from low intellectual functioning." *Ibid.* This Court denied a petition for a writ of certiorari. 528 U.S. 829 (1999).

5. In 2000, petitioner filed a motion to vacate his conviction and death sentence under 28 U.S.C. 2255. While that motion was pending in the district court, this Court held in *Atkins* v. *Virginia*, 536 U.S. 304 (2002), that the execution of a mentally retarded individual would violate the Eighth Amendment. In his Section 2255 motion, petitioner contended, among other claims, that the district court's finding that he was not mentally retarded was unsupported by the evidence. Petitioner also presented new evidence that he contended supported his claim of mental retardation.

After reexamining the trial record, the district court again rejected petitioner's claim of mental retardation. The court stated that it is "undisputed" that petitioner has a low I.Q. 2003 WL 23109787, at *14. Nevertheless, the court found that the evidence supported the conclusion that "[petitioner] does not have a deficit in adaptive skills," and therefore that he is not mentally retarded under either *Atkins* or 18 U.S.C. 3596(c). *Ibid.* The court granted petitioner a certificate of appealability (COA) on his claim that there was insufficient evidence to support the court's finding on mental retardation. 421 F.3d at 310.

The court of appeals affirmed. The court concluded that the district court had "proceeded dutifully to reexamine the extensive evidence bearing on [petitioner's] mental capacity" and correctly concluded again that petitioner had not established retardation. 421 F.3d at 312. The court explained that, despite petitioner's concededly low I.Q., the government had "effectively countered [petitioner's] claimed retardation" by refuting petitioner's evidence that he lacked adaptive skills. *Id.* at 313.[3]

This Court again denied a petition for a writ of certiorari. 549 U.S. 828 (2006).

6. In 2009, petitioner moved the court of appeals for authorization to file a second or successive Section 2255 motion to vacate his death sentence. A second or successive Section 2255 motion may be filed only if authorized by a panel of the court of appeals, and such authorization may be granted only in very limited circumstances. See 28 U.S.C. 2255(h)(1) and (2); see also Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220 (adding this provision). Petitioner sought authorization pursuant to Section 2255(h)(1), which authorizes a second or successive collateral attack based on "newly discovered evidence" only where "[that evidence] would establish by clear and convincing evidence that no reasonable factfinder would have found the prisoner guilty of the offense."

The motion argued that petitioner had discovered new evidence that he is mentally retarded and so ineligible for the death penalty under Section 3596(c) and *Atkins*. The evidence included Social Security records created in connection with petitioner's application, more than a year before the crime, for disability benefits based on a sinus problem. The records showed (1) that three medical professionals had separately found that petitioner was mentally retarded and/or had an extremely low I.Q.; and (2) that records of petitioner's past enrollment in special education classes had been destroyed years before. The evidence also included declarations from petitioner's family members, friends, and acquaintances offered to prove his "adaptive deficits."

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[3] Petitioner also contended that his trial counsel were constitutionally ineffective in failing adequately to investigate and present evidence of retardation. The district court and the court of appeals denied a COA on that issue, because counsel were "far from constitutionally ineffective" and presented "a significant amount" of such evidence. 392 F.3d at 790-791, 793.

7. The court of appeals denied the request for authorization to file a successive motion under Section 2255. Pet. App. 1a-12a.

a. The court held that, under the plain language of Section 2255(h)(1), the newly discovered evidence must negate guilt of *the offense*; the provision "does not encompass challenges to a sentence." Pet. App. 4a.[4] The court rejected petitioner's argument that Section 2255(h)(1) should be read to permit a claim that the movant is "not guilty of the death penalty." The court explained that "[h]ad Congress wanted the provision to cover challenges to a sentence—even if only to a death sentence—it could easily have referenced sentences explicitly in the text, as it did numerous times throughout § 2255." *Id.* at 6a-7a. Or Congress could have used the term "actual innocence," which, before the enactment of Section 2255(h), had been construed by the courts, in connection with the "actual innocence" exception to the cause-and-prejudice requirement for excusing procedural default, as extending to some capital sentencing challenges. *Id.* at 5a, 7a. But instead, the court of appeals observed, Congress "elected to couch § 2255(h) * * * in the markedly different, unmistakable terms of *guilt of the offense*." *Ibid.*

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[4] The government had argued that petitioner had not met the burden of showing by clear and convincing evidence that no reasonable factfinder would find him mentally retarded; the government did not address whether such a sentencing challenge may *ever* be brought in a second or successive motion.

The court clarified that it "d[id] not mean to suggest that a prisoner is jurisdictionally barred from seeking successive review where he contests a factual predicate of his capital murder conviction, without which he would be guilty only of non-capital murder." Pet. App. 6a n.5. The court cited a Ninth Circuit case holding that a challenge to the "special circumstance" of rape, which had rendered the defendant death-eligible, was a challenge to the "offense" of capital murder. *Ibid.* (citing *Thompson* v. *Calderon*, 151 F.3d 918, 923-924 (9th Cir.) (en banc), cert. denied, 524 U.S. 965 (1998)).

b. Judge Wiener filed a concurring opinion. Pet. App. 9a-12a. Although Judge Wiener agreed that petitioner's successive collateral attack was barred under the plain terms of Section 2255(h)(1), he wrote to express his concern that, if petitioner's proffered evidence were presented to a factfinder, it would show that petitioner is mentally retarded. *Id.* at 9a.

ARGUMENT

Congress has eliminated certiorari review of denials of authorization to file a second or successive collateral attack. This Court therefore lacks jurisdiction to take up the questions presented by the petition for a writ of certiorari in this case. Further review would not be warranted in any event: the decision of the court of appeals is correct and does not conflict with any other decision of another court of appeals or this Court. Moreover, as the government explained in the court of appeals, even if a court of appeals may authorize a second or successive collateral attack based on newly discovered facts establishing by clear and convincing evidence that the defendant is ineligible for a death sentence, petitioner has not made that showing here. Nothing in petitioner's proffered evidence clearly demonstrates any error in the finding that petitioner is not retarded—a finding that the district court has twice made, after extensive adversarial presentation, and the court of appeals has twice affirmed.

1. a. Congress has determined by statute that decisions of the courts of appeals denying authorization to file a second or successive collateral attack are not subject to certiorari review. 28 U.S.C. 2244(b)(3)(E). Section 2244(b)(3)(E) provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Petitioner acknowledges (Pet. 15-16) that Section 2244(b)(3)(E) validly eliminates this Court's jurisdiction over the specified class of cases; petitioner contends, however (Pet. 16-22), that decisions denying authorization to file a second or successive Section 2255 motion are not within that class. That contention is incorrect.

Section 2255 provides that the same procedure that applies to the authorizing of second or successive habeas corpus petitions by state prisoners—the procedure set out in Section 2244—applies to the authorizing of second or successive Section 2255 motions. Section 2255(h) states that a second or successive Section 2255 motion "must be certified *as provided in section 2244* by a panel of the appropriate court of appeals" to meet the standard. 28 U.S.C. 2255(h) (emphasis added). Section 2244, in turn, specifies who shall decide ("a panel of the court of appeals"), what must be decided (whether the petitioner has made "a prima facie showing" that he meets the applicable standard), when the decision must be made (promptly after filing), and that the decision is final and unreviewable (*i.e.*, not "the subject of a petition for rehearing or for a writ of certiorari"). 28 U.S.C. 2244(b)(3)(B)-(E). And although Section 2255 sets out the substantive requirements that a successive motion must meet to be authorized, those requirements are substantially identical to the substantive requirements in Section 2244. Compare 28 U.S.C. 2244(b)(2) with 28 U.S.C. 2255(h).

Petitioner argues (Pet. 15-20) that although Subparagraphs (b)(3)(A), (B), (C), and (D) all apply to second or successive Section 2255 motions, Subparagraph (b)(3)(E) does not. But "[t]he language of § 2255 * * * makes no effort to specify which provisions of § 2244 it intends to incorporate. In the absence of such a specification, it is logical to assume that Congress intended to refer to all of the subsections of § 2244 dealing with the authorization of second and successive motions, including * * * § 2244(b)(3)(E)." *Triestman* v. *United States*, 124 F.3d 361, 367 (2d Cir. 1997) (Calabresi, J.). Petitioner contends (Pet. 18) that the use of the term "certified" in Section 2255(h) indicates that "there is no adoption or incorporation of the parts of Section 2244 that do not address the procedure *for* certification." But the identity of the decisionmaker plainly *is* a key part of the procedure for certification: Congress intended for certification decisions to be made by a single panel of three appellate judges, for the decisions to be made quickly, and for decisions granting or denying certification to be final. Put another way, if petitioner obtained the relief he seeks—an order by this Court that his successive collateral attack be certified as permissible—his Section 2255 motion would *not* have been "certified as provided in Section 2244," which restricts that certification decision to the court of appeals.

The text and structure of Section 2244 confirm that Congress did not exclude Section 2255 motions from the operation of Subparagraph (b)(3)(E). The 1996 amendments to Section 2244 were in the section of AEDPA immediately following the amendments to Section 2255 and demonstrably were written with the latter amendments in mind. See, *e.g.*, AEDPA § 106(a), 110 Stat. 1220 (making "conforming amendment" to Section 2244(a) to add a cross-reference to Section 2255).

Furthermore, throughout Section 2244, when Congress intended to refer to a state prisoner's petition for a writ of habeas corpus, it said so specifically. See 28 U.S.C. 2244(b)(1) ("a second or successive habeas corpus application under section 2254"), (b)(2) (same), (c) ("a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court"), (d)(1) (similar). When Congress intended to refer only to a federal prisoner's petition, it said so. See 28 U.S.C. 2244(a) ("an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States"). But in the certification subparagraphs—including not only Subparagraphs (b)(3)(A)-(D), which petitioner concedes apply to both state and federal prisoners' certification requests, but also Subparagraph (b)(3)(E), the applicability of which is at issue here—Congress used only the term "a second or successive application," or "a second or successive application permitted by this section." The absence of any limiting language from these subparagraphs, and only these, is significant—especially given the simultaneous and conforming amendments to Sections 2244 and 2255, see pp. 13-14, *supra*.[5]

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[5] Petitioner's other interpretive arguments fail as well. The canon of *expressio unius est exclusio alterius* (Pet. 19-20) has no application here, because Congress did not omit the relevant language from Section 2255; it included it by express cross-reference to Section 2244. And petitioner cannot contradict that plain text with a statement at a Senate hearing about AEDPA's purported purpose (Pet 19) by a witness who *opposed* several AEDPA reforms and "le[ft] * * * unaddressed" the

Castro v. *United States*, 540 U.S. 375 (2003), is not to the contrary. In that case, the dispute concerned whether Castro's Section 2255 motion was his second such motion (as the lower courts held) or his first. Castro did not ask the court of appeals for authorization to file a second or successive Section 2255 motion, because he viewed his motion as a *first* motion that does not require authorization, and the court of appeals did not deny such a request. This Court thus found Section 2244(b)(3)(E) inapplicable because there was no "statutorily relevant 'denial'" of a successive application for collateral relief. 540 U.S. at 380. The Court added that even if the court of appeals was read to have not only held that Castro's motion was his second one, but also denied Castro authorization to file it, the jurisdictional bar would not apply because "the 'subject" of Castro's [certiorari] petition [was] not the Court of Appeals' 'denial of an authorization,'" but "the lower courts' refusal to recognize that this [Section] 2255 motion is his first, not his second." *Ibid.*

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tightened rules for successive petitions. *Federal Habeas Corpus Reform. Eliminating Prisoners' Abuse of the Judicial Process. Hearings Before the S. Comm on the Judiciary*, 104th Cong., 1st Sess 87 (1995) (statement of Nicholas deB. Katzenbach). In any event, Congress plainly was concerned with bringing finality to federal as well as state postconviction review See AEDPA § 105, 110 Stat. 1220 (adding time limits and second-or-successive provisions to Section 2255); *Calderon* v. *Thompson*, 523 U.S. 538, 558 (1998) (explaining that the stricter limitations AEDPA imposed on the filing of second or successive collateral attacks are "grounded in respect for the finality of criminal judgments").

Finally, the case petitioner cites (Pet. 20) in support of a "narrow" construction of Section 2244(b)(3)(E) stands for the proposition that federal courts narrowly construe enactments that preclude *any* judicial review of executive action—not enactments that only limit appellate review of judicial decisions. See *Utah* v. *Evans*, 536 U S. 452, 462-463 (2002) (citing *Webster* v. *Doe*, 486 U.S. 592, 603 (1988))

Here, by contrast, petitioner specifically asked the court of appeals for authorization under Section 2255(h) to file a successive motion, and the court specifically denied the request. Pet. App. 8a. That denial is the "subject" of petitioner's petition for certiorari, which challenges the denial on both statutory and constitutional grounds.[6]

b. Because Section 2244(b)(3)(E) applies to petitions for rehearing as well as petitions for certiorari, the courts of appeals have confronted this question as well. Every court to have done so has concluded that the finality rule of Section 2244(b)(3)(E) is fully applicable to Section 2255 cases. *E.g.*, *Triestman*, 124 F.3d at 367; accord *Leonard* v. *United States*, 383 F.3d 1146, 1148 (10th Cir. 2004); *In re Sonshine*, 132 F.3d 1133, 1134 (6th Cir. 1997); *United States* v. *Lorentsen*, 106 F.3d 278, 279 (9th Cir. 1997); see also *In re Davenport*, 147 F.3d 605, 608 (7th Cir. 1998).

Indeed, after the Court in *Castro* raised *sua sponte* the question whether Castro's petition for a writ of certiorari was barred by Section 2244(b)(3)(E), see 537 U.S. 1170 (2003), an amicus suggested the argument petitioner now makes: that the jurisdictional bar does not apply to Section 2255 cases at all. National Ass'n of Criminal Def. Lawyers Br. at 12 n.2, *Castro*, *supra* (No. 02-6683). The government then briefed that issue. U.S. Br. at 13-15, *Castro*, *supra* (No. 02-6683). This Court decided the case on different grounds that apply equally to state and federal postconviction review, thus leaving undisturbed the consensus view of the courts of appeals that the bar on filing rehearing or certiorari petitions applies to requests for certification of successive Section 2255 motions. As already explained, that consensus view is correct.

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[6] Similarly, because petitioner's motion plainly is second or successive, *Adamo Wrecking Co* v. *United States*, 434 U.S. 275 (1978), is inapposite: as the Court explained in *Castro*, 540 U.S. at 380, *Adamo Wrecking* held only that a bar on reviewing emission standards does not bar a "narrow inquiry" into whether a regulation *is* an emission standard. 434 U.S. at 285.

c. Section 2244(b)(3)(E)'s bar against this Court's review of orders denying leave to file a second or successive Section 2255 motion does not mean that federal postconviction litigants are altogether without recourse to this Court. First, as *Castro* makes clear, this Court retains the ability to review allegations that a motion does not fit the specialized meaning of "second or successive," see, *e.g.*, *Magwood* v. *Patterson*, 130 S. Ct. 2788, 2796-2797 (2010), and may be considered without prior certification by the court of appeals. Second, in cases where Section 2255 truly is an "inadequate or ineffective" remedy, 28 U.S.C. 2255(e), federal defendants may seek habeas corpus relief under 28 U.S.C. 2241, with ultimate review in this Court. Third, there may be avenues of review in this Court other than certiorari. Courts of appeals in Section 2255 proceedings might under exceptional circumstances certify questions to this Court. See *Felker* v. *Turpin*, 518 U.S. 651, 666 (1996) (Stevens, J., concurring) (citing 28 U.S.C. 1254(2)); *id.* at 667 (Souter, J., concurring) (same). And to the extent permitted by 28 U.S.C. 2255(e), a federal defendant may be able to seek habeas relief directly in this Court, as state prisoners may do when they cannot seek certiorari review of a decision denying certification of a second or successive habeas petition. *Felker*, 518 U.S. at 658-662; *In re Davis*, 130 S. Ct. 1 (2009).

2. In any event, the court of appeals correctly rejected petitioner's claim that he should be permitted to file a successive Section 2255 motion even though he concededly cannot show "that no reasonable factfinder

would have found [him] *guilty of the offense*." 28 U.S.C. 2255(h)(1) (emphasis added). That decision is in accord with every appellate decision considering comparable circumstances; petitioner alleges a circuit conflict based on a single Ninth Circuit decision, but that case in fact involved an allegation that, if true, would have established the habeas petitioner's innocence of the capital offense.

a. Under Section 2255(h)(1), in order to obtain authorization to file a successive Section 2255 motion based on newly discovered evidence, an applicant must show that the new evidence would establish that he is not "guilty of the offense." 28 U.S.C. 2255(h)(1); see also 28 U.S.C. 2244(b)(2)(B)(ii) (similar requirement for second or successive habeas petition by state prisoner); 28 U.S.C. 2255(e)(2)(B) (similar requirement for evidentiary hearing on claims not factually developed in state court). Congress's use of the word "offense" plainly excludes challenges to sentences, including death sentences. See *In re Jones*, 137 F.3d 1271, 1274 (11th Cir. 1998); *Burris* v. *Parke*, 130 F.3d 782, 785 (7th Cir.), cert. denied, 522 U.S. 990 (1997); *In re Medina*, 109 F.3d 1556, 1565 (11th Cir.), cert. denied, 520 U.S. 1151 (1997), overruled on other grounds by *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998); *Greenawalt* v. *Stewart*, 105 F.3d 1268, 1277 (9th Cir.) (per curiam) (*Greenawalt I*), cert. denied, 519 U.S. 1102 (1997), abrogated on other grounds by *Rhines* v. *Weber*, 544 U.S. 269 (2005); *Greenawalt* v. *Stewart*, 105 F.3d 1287, 1288 (9th Cir.) (per curiam), cert. denied, 519 U.S. 1103 (1997); see also *Ward* v. *Hall*, 592 F.3d 1144, 1161 (11th Cir. 2010) (construing Section 2254(e)(2)(B)), petition for cert. pending, No. 10-288 (filed Aug. 25, 2010); *Burris* v. *Parke*, 116 F.3d 256, 258 (7th Cir. 1997) (same).[7]

To be sure, a challenge to the conviction for the underlying "offense" may affect the defendant's eligibility for the death penalty as well. That was the crucial fact in the Ninth Circuit case on which petitioner relies, *Thompson* v. *Calderon*, 151 F.3d 918 (en banc), cert. denied, 524 U.S. 965 (1998), and for that reason *Thompson* does not support petitioner's argument. In *Thompson*, the habeas petitioner contended that his new evidence would show that he was not guilty of the offense of capital murder, but at most guilty of the lesser offense of homicide, because the new evidence would refute the special circumstance that made his crime a capital one. *Id.* at 920, 923, 924. That special circumstance, the court held, is charged in the indictment as part of the offense of capital murder; "[t]hus, by claiming the infirmity of the lone special circumstance that made him eligible for the death penalty, Thompson is challenging his conviction of the 'underlying offense' of capital murder." *Id.* at 924. The Ninth Circuit has reiterated, in the subsequent case that petitioner also cites, that innocence of the "offense" of capital murder in this context means "actual innocence of either the murder * * * or the special circumstance findings that made [the defendant] eligible for the death penalty." *Babbitt* v. *Woodford*, 177 F.3d 744, 748, cert. denied, 526 U.S. 1107

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[7] Another court has held that the word "offense" in Section 2255(h)(1) does not encompass attacks on sentences of imprisonment, without deciding whether it encompasses attacks on sentences of death. *In re Vial*, 115 F.3d 1192, 1198 n.12 (4th Cir. 1997) (en banc). See also *LaFevers* v. *Gibson*, 238 F.3d 1263, 1267 (10th Cir. 2001) (reserving the question whether Section 2244(b)(2)(B)(ii) extends to capital sentencing challenges).

(1999). The court of appeals here so understood *Thompson* and did not disagree. See Pet. App. 6a n.5.

By contrast, the Ninth Circuit has squarely held that claims purporting to show that no reasonable *penalty-phase* juror would have *imposed* a sentence of death on a death-eligible defendant do not challenge the "offense," and such claims thus are not cognizable under Section 2244(b)(2)(B)(ii). See *Greenawalt I*, 105 F.3d at 1277 (denying leave to file a successive petition "because the constitutional error alleged by Greenawalt is ineffective assistance of counsel at [capital] *sentencing*, and he cannot demonstrate that 'no reasonable factfinder would have found [him] *guilty* of the underlying offense'").

Petitioner's claim of a circuit conflict thus fails: no court of appeals has held that Section 2255(h)(1) encompasses all newly discovered evidence "relating to a death sentence." Pet. 33, 34.

b. Although petitioner claims (Pet. 27 n.9) that he, too, is contending that he is not "guilty" of capital murder, that contention lacks merit. Petitioner is not, for instance, challenging proof of the element of the offense that made it a capital crime, *i.e.*, that death resulted from the kidnapping. See 18 U.S.C. 1201(a) (1994). Nor is he challenging proof of his intent to kill Lisa Rene or of the three statutory aggravating factors. The court below made that clear, because it cited *Thompson* with approval and stated that it "d[id] not mean to suggest that a prisoner is jurisdictionally barred from seeking successive review where he contests a factual predicate of his capital murder conviction, without which he would have been guilty only of non-capital murder." Pet. App. 6a n.5.

Rather, petitioner's argument is that he may not be executed; upholding that claim would not alter the offense, or the statutory aggravating circumstances, of which he is guilty. See 18 U.S.C. 3596(c). As the court of appeals explained in affirming the denial of petitioner's first Section 2255 motion, nothing in the FDPA or in this Court's capital-sentencing jurisprudence requires the government to *dis*prove the defendant's retardation beyond a reasonable doubt, as if non-retardation were an element or a statutory aggravating factor. To the contrary, "a substantive limitation on [capital] sentencing" imposed by the Eighth Amendment is not an "element[] of the crime of murder" and "need not be enforced by the jury." *Cabana* v. *Bullock*, 474 U.S. 376, 385, 386 (1986), overruled in part on other grounds by *Pope* v. *Illinois*, 481 U.S. 497, 503 n.7 (1987). Indeed, the burden of establishing retardation may permissibly be placed on the defendant, whereas the burden of disproving any element or statutory aggravating factor cannot. See, *e.g.*, 421 F.3d at 311-312 & n.10; *Walker* v. *True*, 399 F.3d 315, 326 (4th Cir. 2005); *State* v. *Grell*, 135 P.3d 696, 706-707 (Ariz. 2006), cert. denied, 550 U.S. 937 (2007); accord *United States* v. *Davis*, 611 F. Supp. 2d 472, 474 (D. Md. 2009) (citing cases); cf. *Dixon* v. *United States*, 548 U.S. 1, 6-8 (2006) (burden of proving duress may permissibly be placed on defendant); *Medina* v. *California*, 505 U.S. 437, 449 (1992) (same, for proof of incompetence to stand trial). Petitioner therefore is incorrect in asserting (Pet. 28) that establishing his "categorical ineligiblity for the death sentence" under the Eighth Amendment would be equivalent to showing that he is not guilty of the capital "offense" of kidnapping resulting in death.

c. Relying on case law pre-dating the enactment of AEDPA, petitioner argues (Pet. 25-29) that the word "offense" in Section 2255(h)(1) should be construed to cover a claim that the movant is "not guilty of the death penalty." But nothing in the word "offense," or any-where else in the text of Section 2255(h)(1), suggests that Congress codified any pre-AEDPA doctrine that will help petitioner.[8]

Before the enactment of AEDPA, this Court had held that the judge-made doctrines precluding successive, abusive, or procedurally defaulted habeas applications, see *Schlup* v. *Delo*, 513 U.S. 298, 318-319 & n.34 (1995), could be overcome by a showing of a "fundamental miscarriage of justice," which had come to mean "actual innocence." *Id.* at 321. And the Court had also held that an otherwise abusive habeas petition in a capital case could proceed if the habeas petitioner could show his "actual innocence of the death penalty," *Sawyer* v. *Whitley*, 505 U.S. 333, 340-341 (1992), although the situations were "distinguishable" and proof of innocence of the death penalty had to be much more "exacting" than proof of innocence of the crime, *Schlup*, 513 U.S. at 325-326.[9]

As the Seventh Circuit has explained, "[t]he 'actual innocence' exception of the prior law was judge-made, and so its contours were appropriately judge-fashioned and permissibly judge-expanded." *Hope* v. *United States*, 108 F.3d 119, 120 (7th Cir.), cert. denied, 515 U.S. 1132 (1997). The exception in Section 2255(h)(1), on the other hand, "is graven in statutory language that could not be any clearer." *Ibid.*[10] Had Congress wished to continue pre-AEDPA law on successive petitions rather than to change it, it would have used one of the phrases that appeared in this Court's pre-AEDPA cases—"fundamental miscarriage of justice" or "actual innocence"—phrases that are not "self-defining" but take their meaning from this Court's cases, Pet. 30 (quoting *Panetti* v. *Quarterman*, 551 U.S. 930, 943-944 (2007)).[11] Instead Congress made the touchstone "guilt[] of the *offense*," 28 U.S.C. 2255(h)(1) (emphasis added), a term that *is* self-defining and is not "permissibly judge-expanded."[12]

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[8] Indeed, in many respects (including in Section 2255(h)(1)), AEDPA expressly *rejected* prior law by imposing more restrictive limitations. Compare, *e g.*, *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995) (rejecting clear-and-convincing standard for actual-innocence claims), with 28 U.S.C 2244(b)(2)(B)(ii), 2255(h)(1) (adopting clear-and-convincing standard for such claims).

[9] The Ninth Circuit's decision in *Thompson* briefly addressed the notion that AEDPA codified the standard for claiming innocence of the death penalty. But although the court in *Thompson* concluded and rejected one textual argument purporting to show that Congress *rejected* the pre-AEDPA decisional law, it did not point to anything suggesting that Congress *adopted* the pre-AEDPA law. 151 F.3d at 923-924. And in any event, as the Ninth Circuit's prior decision in *Greenawalt I* and subsequent decision in *Babbitt* make clear, the basis for the holding in *Thompson* is that Thompson was challenging an element of his conviction for capital murder. See pp. 19-20, *supra*.

3. In any event, even if clear and convincing evidence of mental retardation hypothetically would satisfy Section 2255(h)(1)'s requirement to make a prima facie showing of actual innocence, that proposition would be of no use to petitioner, because he cannot possibly "establish by clear and convincing evidence that no reasonable factfinder would have found" that he was eligible for the death penalty "in light of the evidence as a

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[10] Petitioner's reliance on a pre-AEDPA "ends of justice" exception to the judge-made rules (Pet. 31-32) thus is unavailing post-AEDPA.

[11] The cases on which petitioner relies give the term "second or successive" such a specialized meaning, in each case to ensure that a claim could be heard the first time it ripens or is exhausted—not to permit repeated relitigation on the merits of the same claim. See *Panetti*, 551 U.S at 943-946; *Slack* v. *McDaniel*, 529 U.S 473, 487 (2000); *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 643 (1998). Petitioner's motion, by contrast, plainly *is* second or successive. See pp. 15-16, *supra*

[12] The import of Section 2255(h)(1)'s reference to "the offense" is all the more clear in context, as Section 2255 in several places refers to collateral challenges to a sentence. 28 U.S.C. 2255(a) and (b).

whole." 28 U.S.C. 2255(h)(1). That is an exceptionally demanding standard: it requires that petitioner's prima facie showing be not just persuasive, but beyond reasonable factual dispute. Petitioner has not met that standard.

As petitioner agreed in the district court, to establish mental retardation, a defendant must do more than show that he has a low I.Q.; he must also show that he has "significant limitations in adaptive functioning." *Morris* v. *Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); see also *Atkins*, 536 U.S. at 308 n.3. In considering petitioner's first postconviction challenge to the district court's finding that petitioner is not mentally retarded, the court of appeals acknowledged that petitioner's I.Q. is low. See 421 F.3d at 312-313. Rather, it is with respect to the element of adaptive deficits that the government has thoroughly refuted petitioner's mental retardation claim, and on that score, petitioner's proffered evidence adds little to his case.

The evidence at trial showed that petitioner demonstrated adaptability by working as a drug dealer; by concocting cover stories after he was arrested; by making excuses to police when they found on his person the key to the motel room in which Lisa Rene was held and raped; and by burning his clothes after her murder. 421 F.3d at 313.[13] The government also presented evidence that, while incarcerated, petitioner engaged in various activities inconsistent with mental retardation, such as writing letters to fellow inmates; complaining when he received incorrect change from the prison commissary; receiving letters and newspapers; reading aloud from newspapers; writing request slips for various services;

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[13] Notably, this evidence pertains to petitioner's documented behavior *outside* the prison environment, which petitioner argues is more "rigidly controlled" and hence less probative. Pet. C.A. Reply Br. 8.

preparing written grievances; submitting names and addresses of people for his visitation list; and sneaking into the women's section of the jail. *Id.* at 313-314 n.15. The district court, in rejecting petitioner's mental retardation claim, found that this and other evidence reflected that petitioner "has adapted to the criminal life that he chose," and that he has "the ability to communicate with others, [to] care for himself, [to] have social interaction with others, [to] live within the confines of the 'home' he has been in since he was sixteen, [to] use community resources within this home, [and to] read, write, and perform some rudimentary math." *Id.* at 313. And the court of appeals found that the evidence supporting the district court's ruling was "substantial." 162 F.3d at 353.

Petitioner's most recent submission does not significantly detract from the strength of the above evidence. It consists primarily of the findings of three medical professionals in connection with petitioner's application to the Social Security Administration for disability benefits based on a sinus condition one year before the murder.[14] One of the doctors, C.M. Rittlemeyer, who conducted a general physical examination of petitioner, included in his diagnosis: "Mental retardation. Flat feet. Chronic sinus problems and allergies." Gov't C.A. Br. 16. The record does not reflect that Dr. Rittlemeyer did any I.Q. or adaptive skills testing. *Ibid.* Given that he was conducting a physical examination, his diagnosis of mental retardation may well have rested on petitioner's self-reporting.

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[14] The Social Security records also contain a letter from petitioner's school district suggesting that he was enrolled in special education classes while in school, contrary to the recollections of petitioner's teachers that he had not been in special education. See Pet. C.A. Decl. of Steven J. Wells Exh G, at G.17 (Wells Decl.) (stating in full: "The above student's Special Education records were destroyed in 1988. A letter was mailed to parents at the last known address, telling them they could have the records if they wanted them. There was no response to the letter."). Any further proof of petitioner's limited intelligence is cumulative of already-presented evidence and has little bearing on the question whether he suffers from sufficient adaptive deficits to qualify as mentally retarded Petitioner previously argued that he was not placed in special education because of racial discrimination in the school district; in rejecting petitioner's arguments related to that claim, both the court of appeals and the district court observed that "the

Dr. Edward Hackett, a psychologist, diagnosed petitioner with mild mental retardation based on an I.Q. of 59, but noted that petitioner "manifested many inconsistencies regarding his street behavior and curent attempts to seek employment." Wells Decl. Exh. G, at G.16. In supplemental information provided to the Social Security Administration, he noted that "[t]here may have been some malingering" because "[t]he IQ scores are not normal considering history." *Id.* at G.14. Petitioner was "quite verbal" and the I.Q. scores were lower on the performance test than the verbal test, whereas "[a] person that displays antisocial personality," as petitioner does, "usually scores higher on performance." *Ibid.* He concluded that petitioner "was * * * a somewhat mild[ly] retarded con man, but very street wise." *Ibid.*; Gov't C.A. Br. 17.

Another psychologist, Dr. Charles Spellman, conducted another psychological examination "in order to better ascertain eligibility for [disability] benefits." Wells Decl. Exh. G, at G.11. He diagnosed petitioner as being mentally retarded based on his I.Q. "estimation" ("69 or lower"), petitioner's self-reporting regarding his level of functioning, and his observations of petitioner,

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government's effort [in the mental-retardation proceedings] did not depend in any significant respect on [petitioner's] non-enrollment in special education courses." 421 F.3d at 314 n.16 (quoting 392 F.3d at 799); see 2003 WL 23109787, at *8.

who had an incentive to exaggerate his mental deficiency in order to obtain disability benefits. *Id.* at G.13; Gov't C.A. Br. 17. Dr. Spellman saw no evidence of malingering, Wells Decl. Exh. G, at G.13, but unlike Dr. Hackett, who performed a Wechsler I.Q. test and suspected malingering, Dr. Spellman did not report performing any such testing

This evidence, "viewed in light of" the expert and other evidence that the government presented at the penalty phase, 28 U.S.C. 2255(h)(1), would not compel any reasonable factfinder to conclude by clear and convincing evidence that petitioner is mentally retarded. Indeed, one of petitioner's three reports suspected malingering; one did not reflect any I.Q. test; and one was merely a physical examination. And the government's evidence showed that petitioner has demonstrated adaptive skills in a number of ways—ways particularly tailored to the criminal and correctional environments in which petitioner has spent his adolescence and adulthood, including petitioner's attempt to cover up his participation in the murder at issue here. See 421 F.3d at 313 n.15; 2003 WL 23109787, at *12-*14.[15] For those reasons, petitioner could not obtain certification of his successive motion even if his renewed claim of mental retardation were cognizable under Section 2255(h)(1).

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[15] In support of his motion, petitioner also submitted declarations from 11 family members, friends, and acquaintances, five of whom also testified at the penalty phase of his trial and one of whom was interviewed by petitioner's counsel before trial. Pet C.A. Br. 29 n.11. Petitioner's use of the declarations is time-barred because petitioner could have obtained them by the exercise of due diligence within one year of his conviction. See 28 U.S.C. 2255(f)(4). In the court of appeals, petitioner offered no reason why these declarations would be timely, except to argue that mental retardation or actual innocence should excuse compliance with the statute of limitations. Pet. C.A. Reply Br. 14-15. In any event, given that they come from interested sources, the declarations have debatable probative value.

4. Because the Constitution bars the execution of mentally retarded defendants, petitioner argues briefly (Pet. 35-37) that, if Section 2255(h)(1) precludes him from relitigating the question of his mental retardation based on the proffered evidence, then the provision is to that extent unconstitutional. Petitioner does not contend that Section 2255's limitations on successive postconviction filings are an unconstitutional suspension of the writ of habeas corpus.[16] Rather, he contends that he is entitled to another hearing on his Eighth Amendment claim by either the Eighth Amendment itself or the Due Process Clause. Both contentions lack merit.

Even before *Atkins*, petitioner had an adequate opportunity to present his mental-retardation theory, both to the jury (which considered the mitigating factor whether petitioner is or *may be* retarded) and to the court. Petitioner appears to contend that he is entitled to unlimited *additional* opportunities to persuade the courts that he is mentally retarded, and that any statute precluding the possibility of relief on a future meritorious *Atkins* claim is unconstitutional. That theory, for which petitioner offers no support, would prove far too much: it reads the Eighth Amendment to require endless opportunities to relitigate any constitutional fact that, if proved, would exempt the defendant from the imposition of the death penalty (for instance, a felony-murder defendant's lack of culpable intent, see *Tison* v. *Arizona*, 481 U.S. 137, 155-158 (1987); 18 U.S.C.

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[16] The amicus makes such an argument, Advocates for Human Rights Br. 16-18, but it is unavailing. See *Felker* v. *Turpin*, 518 U.S. 651, 666 (1996); see also 28 U.S.C 2255(e) (savings clause permitting federal defendants to file habeas petitions if Section 2255 is an inadequate or ineffective remedy).

3591(a)(2), or the defendant's age at the time of the offense, see *Roper* v. *Simmons*, 543 U.S. 551 (2005); 18 U.S.C. 3591(a)). And petitioner's constitutional theory would not stop there: because even on petitioner's reading, Section 2255(h)(1) precludes relief unless petitioner establishes not only a prima facie case of mental retardation, but a prima facie case that *any* reasonable factfinder would find him mentally retarded, petitioner's theory apparently would hold the statute unconstitutional in those close cases in which reasonable factfinders may disagree.

Nothing in the Eighth Amendment or the Due Process Clause requires such a result. The constitutionally valid limits that Congress has placed on postconviction relief, see note 16, *supra*, extend equally to Eighth Amendment claims. Cf., *e.g.*, *Stewart* v. *LaGrand*, 526 U.S. 115, 119-120 (1999) (per curiam) (claim that method of execution violated Eighth Amendment was procedurally defaulted). And in this case, petitioner's claimed mental retardation has long been a live issue and petitioner has actively litigated it for many years, both on direct review and on his first motion for postconviction relief. Cf. *Ford* v. *Wainwright*, 477 U.S. 399, 424-425 (1986) (Powell, J., concurring in part and concurring in the judgment) (determination of competency to be executed must involve an "opportunity [for defendant] to be heard," but need not be a "full-scale 'sanity trial'").[17]

This Court noted in *Atkins* that it would "leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of [capital] sentences" against mentally retarded defendants. 536 U.S. at 317. Well before *Atkins*, in the

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[17] Even once "judicial process has been exhausted," petitioner also may pursue clemency as a further "'fail safe.'" *Harbison* v. *Bell*, 129 S. Ct. 1481, 1490 (2009) (citations omitted); see 18 U.S.C. 3599(e).

FDPA and AEDPA, Congress determined both that the federal government would not execute mentally retarded defendants *and* that a defendant would ordinarily be limited to two opportunities to litigate that issue—direct review and a first Section 2255 motion—unless the defendant can meet the standards of Section 2255(h). Because petitioner does not meet those standards, neither the Eighth Amendment nor the Due Process Clause requires that his claim be heard again.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[18] Because petitioner's constitutional claim lacks merit, so does his argument (Pet. 24-25) that Section 2255(h)(1) should be construed, despite its unambiguous text, to allow his successive motion in order to avoid an unconstitutional result.

174

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No. 10-150

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In The
Supreme Court of the United States

◆

BRUCE CARNEIL WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

◆

REPLY BRIEF FOR PETITIONER

◆

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS PETITION, AND SHOULD GRANT TO RESOLVE ITS POWER OF REVIEW 2

II. THE MEANING OF SECTION 2255(h) PRESENTS VITALLY IMPORTANT QUESTIONS WHICH THIS COURT SHOULD RESOLVE 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Babbitt v. Woodford, 177 F.3d 744 (9th Cir.), *cert. denied*, 526 U.S. 1107 (1999) 12

Burris v. Parke, 116 F.3d 256 (7th Cir. 1997) 11

Castro v. United States, 537 U.S. 1170 (2003) 2

Castro v. United States, 540 U.S. 375 (2003) 3, 7

Greenawalt v. Stewart, 105 F.3d 1268 (9th Cir.), *cert. denied*, 519 U.S. 1102 (1997) 12

Holland v. Florida, 130 S. Ct. 2549 (2010) 10

In re Medina, 109 F.3d 1556 (11th Cir. 1997) 11

Landrigan v. Brewer, ___ F.3d ___, 2010 WL 4260105 (9th Cir. Oct. 26, 2010) 12

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) 3

Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection, 474 U.S. 494 (1986) 9

Rhines v. Weber, 544 U.S. 269 (2005) 12

Sawyer v. Whitley, 505 U.S. 333 (1992) .... *passim*

Slack v. McDaniel, 529 U.S. 473 (2000) 10

Thompson v. Calderon, 151 F.3d 918 (9th Cir.), *cert. denied*, 524 U.S. 965 (1998) 11, 12, 13

United States v. Ruiz, 536 U.S. 622 (2002) 3

Utah v. Evans, 536 U.S. 452 (2002) 3

Webster v. United States, No. 4:00-CV-1646, 2003 WL 23109787 (N.D. Tex. Sept. 30, 2003) 1

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1220 5

AEDPA, Pub. L. No. 104-132, § 106(a), 110 Stat. 1220 5

18 U.S.C. § 3591 8

18 U.S.C. § 3593 8

18 U.S.C. § 3596 8

28 U.S.C. § 1254 4

28 U.S.C. § 2244 .... *passim*

28 U.S.C. § 2254 .... 5, 6

28 U.S.C. § 2255 .... *passim*

REPLY BRIEF FOR PETITIONER

This case presents the Court with important and recurring jurisdictional questions in the stark context of a federal capital case: Does this Court have the power to review a lower federal court's determination that it cannot even "entertain" a federal prisoner's claim of categorical ineligibility for the death penalty? If so, was the court of appeals wrong to conclude that it is statutorily deprived of jurisdiction to hear that claim because the newly discovered evidence in that claim challenges eligibility for the death sentence and not guilt? And if it was not wrong, is that statute, so construed, a deprivation of due process and an infliction of cruel and unusual punishment on the mentally retarded?

Petitioner does not seek to challenge his guilt for the underlying crime,[1] but he does seek to challenge the execution of an unconstitutional punishment. Properly read, the statutory language permits the courts to consider such a challenge, which would be meritorious here. Although this Court is not asked to decide the "merits" of that challenge, but instead to remand it to the Fifth Circuit for determination, the Court can certainly take note of what the concurrence below candidly acknowledged: that the newly discovered evidence Petitioner seeks to present would "virtually guarantee[ ]" a finding of mental retardation and thereby prevent an "unconstitutional punishment." Pet. App. 9a, 12a.[2] This case is thus a compelling vehicle by which to review the important questions presented.

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[1] The government's recitation of its view of the background facts is thus entirely irrelevant to the questions actually presented. It may be noted, nonetheless, that there is significant evidence Petitioner was largely a follower of others, *see Webster v. United States*, No. 4:00-CV-1646, 2003 WL 23109787, at *7 (N.D. Tex Sept 30, 2003), and that even the government's recitation does not claim he acted without others in committing the crime. *See* Gov't Opp'n at 2-4.

I. THIS COURT HAS JURISDICTION TO CONSIDER THIS PETITION, AND SHOULD GRANT TO RESOLVE ITS POWER OF REVIEW.

The question of whether this Court "ha[s] jurisdiction to review the [court of appeals'] decision affirming the dismissal of a § 2255 petition for writ of habeas corpus as second or successive" has already been recognized as important: in *Castro v. United States*, 537 U.S. 1170 (2003), this Court *sua sponte* directed the parties to address that question in their merits briefs. That the *Castro* Court ultimately did not need to reach the issue, finding jurisdiction on other grounds, 540 U.S. 375, 379-81 (2003), does not detract from its importance, and it is now squarely presented again.

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[2] The government's argument that Petitioner's newly discovered evidence would not show that he is mentally retarded is unfounded. There is nothing in the record to support the government's speculation that, for example, the newly discovered pre-crime diagnoses of mental retardation were the result of physical (rather than mental health) evaluations, or that Petitioner's low IQ scores were "self-reported." But such fact issues are for the Fifth Circuit on remand and do not affect the purely legal questions presented to this Court.

Rather than quarrel with the importance of the jurisdictional question, the government makes a merits argument that AEDPA restricts this Court's review.[3] But there is no such express prohibition in Section 2255, and this Court's normal practice is to read jurisdiction-withdrawing provisions narrowly. *See Utah v. Evans*, 536 U.S. 452, 463 (2002). Congress is presumed to know this Court's normal interpretive practice, *see McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and could have expressly stated in Section 2255 that court of appeals' certification decisions relating to applications brought by federal prisoners are unreviewable, but it did not.

Nor did Congress expressly incorporate into Section 2255 the Section 2244(b)(3)(E) restriction on this Court's ability to review a court of appeals' denial of a *state* prisoner's application for certification. Instead, Congress explicitly provided that only those provisions in Section 2244 *providing for certification* of the petition *by the court of appeals* would apply to federal prisoners proceeding under Section 2255:

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[3] Of course, this Court has jurisdiction to consider the jurisdictional question, since it is well-established that this Court "always has jurisdiction to determine its own jurisdiction." *E.g.*, *United States v. Ruiz*, 536 U.S. 622, 628 (2002).

"[a] second or successive motion must be *certified* as provided in section 2244 *by a panel of the appropriate court of appeals*." 28 U.S.C. § 2255(h) (emphasis added). Congress did not incorporate every aspect of Section 2244, but instead only those parts that "provide[ ]" for "certifi[cation] . . . by a panel of the . . . court of appeals." *Id.* Congress said nothing about incorporating restrictions on *review by this Court* of a court of appeals' certification decision. And when Congress explicitly says nothing about withdrawing review jurisdiction, the usual interpretive rule in favor of the jurisdiction expressly granted by 28 U.S.C. § 1254(1) applies.

As the government notes, Congress intended for a panel of the appropriate court of appeals to decide whether a prisoner – state or federal – can bring a second or successive habeas petition, and Petitioner's requested relief does not disturb that procedure. Petitioner does not seek, as the government claims, "an order by this Court that his successive collateral attack be certified as permissible." Gov't Opp'n at 13. Rather, Petitioner asks this Court to overrule the Fifth Circuit's determination that it lacked jurisdiction even to "entertain" the application for the successive motion in the first instance. Thus, if the Court grants the petition and decides in favor of Petitioner here, the relief would be a remand for the Fifth Circuit to determine, in the first instance, whether the newly discovered evidence meets the substantive requirements set forth in Section 2255(h)(1).

The government's reference to the "text and structure" of AEDPA, *see* Gov't Opp'n at 13-14, in fact contradicts its own conclusion that Section 2244 should be applied wholesale to federal prisoners bringing motions under Section 2255. Among other things, AEDPA placed the requirements for a successive petition brought by a federal prisoner in a separate section from the requirements for a successive petition brought by a state prisoner. In particular, the amendment to Section 2255 added subpart (h), which sets forth the requirement that the second or successive motion "be certified as provided in section 2244 by a panel of the appropriate court of appeals" and states the substantive standard for that certification for a federal prisoner. *See* AEDPA, Pub. L. No. 104-132, § 105, 110 Stat. 1220. At the same time, Congress removed the language in Section 2244(a) which had set forth the standard for a second or successive motion brought by a federal prisoner, and instead expressly stated that Section 2255 now provides the substantive standard for such a motion. *See* AEDPA § 106(a). Section 2244(b)(3)(E), the restriction on *review* of the court of appeals' certification decision, was added only to the state prisoner section.

Collectively, these changes indicate a congressional intent to treat successive motions brought by state and federal prisoners differently, as other provisions in Sections 2244, 2254 and 2255 further confirm. *E.g.*, *compare* 28 U.S.C. § 2244(b)(2), *with* 28 U.S.C. § 2255(h) (imposing different substantive requirements on the showing required for certification);

compare 28 U.S.C. §§ 2244(b)(1)-(2) (requiring dismissal of a successive state claim that had been raised before and requiring the exercise of due diligence for a state claim that was not raised before), *with* 28 U.S.C. § 2255(h) (no similar requirements). While some finality concerns are similar, and thus there are similar (though not identical) high bars against second or successive petitions in each section, Congress still had good reason to treat federal and state prisoners differently in light of the federalism concerns that are only raised when federal courts review state court judgments. One need only look to the provisions requiring specific deference to prior state court determinations, *see, e.g.*, 28 U.S.C. § 2254(e), for which there are no federal parallels, *see, e.g.*, 28 U.S.C. § 2255(b). It is thus logical to conclude that Congress intended different review procedures to apply to certification decisions regarding state and federal prisoners, especially when, as shown above, such an interpretation comports with the plain language of the statute.

But in any event, all that involves the merits of the jurisdictional question regarding this Court's power to review Section 2255 decisions, which the Court should grant to answer. This case also concerns the Fifth Circuit's interpretation of the meaning of the statute regarding the Fifth Circuit's own jurisdiction. As to that question, even if the Court were to determine that Section 2244(b)(3)(E)'s bar to its review applies to federal as well as state prisoners, the Court would still separately have the power, as in

Castro, to determine whether the Fifth Circuit correctly interpreted the statutory language in Section 2255(h)(1). Contrary to the government's argument, that statutory interpretation question, rather than the resulting "denial" of authorization, is the "subject" of this petition to this Court.[4] Accordingly, for this reason as well, the Court has jurisdiction to consider the petition, and should grant to do so.

II. THE MEANING OF SECTION 2255(h) PRESENTS VITALLY IMPORTANT QUESTIONS WHICH THIS COURT SHOULD RESOLVE.

Again arguing the merits rather than disputing the importance of the issue, the government contends that Congress's use of the word "offense" in Section 2255(h)(1) "plainly excludes challenges to sentences, including death sentences." Gov't Opp'n at 18. But the government's argument relies on the improper conclusion that there are only two determinations that make up a capital trial: guilt and sentencing. As this Court recognized in *Sawyer v. Whitley*, however, there are *three* determinations: guilt, *eligibility*, and sentence selection. 505 U.S. 333, 341-43 (1992). *Eligibility* is intrinsically entwined with the crime that is charged. It is *death eligibility* that makes an underlying crime a "capital" crime; the exact same set of facts can be charged as a non-capital crime (if, for example, the defendant is a juvenile). Indeed, by statute, a federal case such as this one becomes a "capital" case when the U.S. Attorney separately provides notice, before trial or plea, that he "believes that the circumstances of the offense are such that a sentence of death is justified under this chapter," 18 U.S.C. § 3593(a), not merely that he believes the elements of the underlying offense, such as a kidnapping involving a death, are present. Included in "this chapter" (Title 18, Part 2, Chapter 228) and thus among the factors to be considered by the U.S. Attorney in determining whether the death penalty "is justified," is Section 3596(c), which expressly provides that a "sentence of death shall not be carried out upon a person who is mentally retarded."[5] It is thus entirely plausible that when Congress said "guilty of the offense" in Section 2255 (and not merely "guilty of the *underlying* offense" as it did in Section 2244), it intended to encompass the determination of *eligibility* – i.e., that which makes an offense "capital."[6]

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[4] Tellingly, the government never addresses the fact that the Fifth Circuit itself went out of its way to add a footnote explaining it was making a jurisdictional ruling and was not denying the application on its merits:

> Our decision that the instant motion is beyond the reach of § 2255 is jurisdictional in nature, going to the ability of the district court and this court to entertain the § 2255 motion in the first instance The result makes it unnecessary for this court to address whether, as the government claims, the evidence that Webster seeks to introduce is neither newly discovered nor substantive.

Pet. App. 8a, n 8.

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[5] Also included in "this chapter" is the provision that expressly prohibits the carrying out of a sentence of death on a juvenile 18 U.S.C. § 3591(a). As the government acknowledges, its interpretation of Section 2255(h)(1) would also bar any successive claim by a federal prisoner who has conclusive evidence that he was 16 at the time of the crime Gov't Opp'n at 28-29.

Such an interpretation of the statutory language comports with the pre-AEDPA concept of "actual innocence" of the death penalty and avoids the constitutional difficulties (noted in the third question presented) raised by the government's version. The government hypothesizes that Congress could have used the phrases "fundamental miscarriage of justice" or "actual innocence" to demonstrate its intent to codify the pre-AEDPA law on successive petitions, but that is not the interpretative analysis this Court uses. Instead, "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986). Here, given the three-part nature of federal capital prosecutions, the binary ("offense" and "sentence") language of AEDPA is at worst ambiguous, and certainly does not foreclose continued application of the pre-AEDPA concepts of "fundamental miscarriage of justice" or "actual innocence." Moreover, this Court has recognized that AEDPA does not "undermin[e] basic habeas corpus principles" and seeks "to harmonize the new statute with prior law." *Holland v. Florida,* 130 S. Ct. 2549, 2562 (2010); *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."). The Court should take this case to resolve that ambiguity and to rule that "actual innocence of the death penalty" is still an available exception to what would otherwise be a "second or successive" bar.[7]

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[6] The government's argument that because a defendant has the burden to prove mental retardation, the fact of mental retardation does not go to "guilt" of the "offense" is nonsensical. *See* Gov't Opp'n at 21 No one would argue that an insane person is "guilty of the offense," even though the defendant bears the burden of proving his insanity.

Contrary to the government's contention, the question of whether Congress intended to retain the concept of "actual innocence" within AEDPA has divided and confused the lower courts. The government argues there is no circuit split because the Ninth Circuit "is in accord with every appellate decision considering comparable circumstances," Gov't Opp'n at 18, but does not note for this Court that the Ninth Circuit expressly said it "disagree[d] with the Seventh and Eleventh Circuit decisions rejecting a petitioner's claim of innocence of the death penalty as not cognizable under § 2244(b)(2)(B)." *Thompson v. Calderon*, 151 F.3d 918, 924 n.14 (9th Cir.), *cert. denied*, 524 U.S. 965 (1998) (citing *In re Medina*, 109 F.3d 1556, 1565-66 (11th Cir. 1997); *Burris v. Parke*, 116 F.3d 256, 258 (7th Cir. 1997)).

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[7] It is no answer to say, as the government does, that there are other avenues one "actually innocent of the death penalty" might pursue, such as a plea for executive clemency or an original writ in this Court Those possibilities were also "available" when *Sawyer* was decided, but they did not affect this Court's holding

The holding in *Thompson* is broader than the government's claim that it only allows a petitioner to argue he is innocent of a special circumstance that is a necessary part of capital murder. In *Thompson*, the Ninth Circuit concluded that Congress intended to codify the "innocence of the death penalty" standard from *Sawyer*, 151 F.3d at 923-24, and in *Sawyer* this Court concluded that "innocence of the death penalty" had a "more expansive meaning . . . than simply innocence of the capital offense itself." 505 U.S. at 343. Rather, *Sawyer*'s "innocence of the death penalty" standard focused on the petitioner's *eligibility* for a capital sentence, requiring a petitioner to show by clear and convincing evidence that, but for constitutional error, "no reasonable juror would have found the petitioner to be *eligible for the death penalty*. . . ." 505 U.S. at 336 (emphasis added). The Court concluded, "[s]ensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance *or that some other condition of eligibility had not been met*." *Id.* at 345 (emphasis added). By holding that § 2244(b)(2)(B) codifies the *Sawyer* standard, the *Thompson* court held that even the narrower phrase "guilty of the underlying offense" encompasses a claim that a petitioner is ineligible for a capital sentence. Though decided in 1998, *Thompson* has recently been followed in the Ninth Circuit. *See Landrigan v. Brewer*, ___ F.3d ___, 2010 WL 4260105, at *10 n.5 (9th Cir. Oct. 26, 2010) (reaffirming *Thompson* and entertaining a successive application solely challenging the petitioner's eligibility for a death sentence).

The other Ninth Circuit cases cited by the government do not alter the holding in *Thompson* nor the existence of the circuit split. In *Babbitt v. Woodford*, 177 F.3d 744, 748 (9th Cir.), *cert. denied*, 526 U.S. 1107 (1999), the Ninth Circuit, unlike the Fifth Circuit here, decided in dicta it *could* entertain defendant's claim, even though it concluded the newly discovered evidence did not establish actual innocence of either the crime or the special circumstance findings that made defendant eligible for the death penalty. In *Greenawalt v. Stewart*, 105 F.3d 1268, 1277 (9th Cir.), *cert. denied*, 519 U.S. 1102 (1997), *abrogated on other grounds by Rhines v. Weber*, 544 U.S. 269 (2005), the Ninth Circuit held, consistent with *Thompson* and *Sawyer*, that the phrase "guilty of the underlying offense" did not encompass an ineffective assistance of counsel claim that petitioner's counsel had inadequately presented evidence of mitigating circumstances at the sentencing stage. In this case, of course, the fact of mental retardation is not mitigating evidence, but a circumstance that makes the petitioner categorically ineligible for the death penalty in the first place. As the Ninth Circuit itself acknowledged in *Thompson*, there is disagreement among the circuits over whether AEDPA encompasses a claim such as Petitioner's here, and this Court should now resolve that confusion.

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CONCLUSION

For the foregoing reasons, and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

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BRUCE CARNEIL WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

◆

BRIEF OF THE ADVOCATES FOR HUMAN RIGHTS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

◆

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A capital defendant's mental retardation may not be immediately recognized by lawyers and the courts 5

A. Mentally retarded persons have limited capacities to understand the importance of their disability to their defense or communicate regarding their disability to defense counsel or the court 5

B. Mentally retarded persons typically hide their disability from others 7

C. Most mentally retarded persons have some life skills, making it difficult for defense counsel or the court to recognize their disability 9

II. Habeas cases involving a categorical exclusion from the death penalty for mental retardation do not present the judicial and administrative concerns present in typical habeas cases 11

A. Critical evidence of mental retardation does not decay and may improve over time 12

TABLE OF CONTENTS – Continued

Page

B. A capital defendant seeking to establish that he is mentally retarded requests the relief of an evidentiary hearing and a commuted sentence – not a whole new trial and release......... 14

C. A defendant's challenge to imposition of the death penalty on the basis of mental retardation is a substantive challenge to availability of the death penalty - not a procedural challenge to alleged errors in the original proceeding 15

III. The Fifth Circuit's overly narrow reading of AEDPA undermines *Atkins*, because it would bar petitions based on the same reasons that this Court held warranted categorical exclusion of mentally retarded defendants from the death penalty............. 15

IV. Executing Petitioner would result in an unconstitutional suspension of the writ of habeas corpus.. 16

CONCLUSION.. 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Atkins v. Virginia, 536 U.S. 304 (2002) .... *passim*

Felker v. Turpin, 518 U.S. 651 (1996) 17, 18

Immigration and Naturalization Services v. St. Cyr, 533 U.S. 289 (2001) 16, 17

Sawyer v. Whitley, 505 U.S. 333 (1992) 18

STATE CASES

Emmett v. Commonwealth, 569 S.E.2d 39 (Va. 2002) 10

Morrisette v. Commonwealth, 569 S.E.2d 47 (Va. 2002) 10

Ex Parte Perkins, 851 So. 2d 453 (Ala. 2002) 10

FEDERAL STATUTES

18 U.S.C. § 3596 3

28 U.S.C. § 2255 .... 2, 19

U.S. Const., art. 1, § 9, cl. 2 .... 16, 18

OTHER AUTHORITIES

Am. Ass'n on Intellectual & Developmental Disabilities, *FAQ on Intellectual Disability – Is intellectual disability the same as mental retardation? Why do programs still say mental retardation?*, http://www.aamr.org/content_104.cfm 3

Page

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Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support* (Ruth A. Luckasson et al., eds., 10th ed. 2002) 6

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Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1 (2001) 8

Page

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TABLE OF AUTHORITIES – Continued

Page

Victor R. Scarano, M.D., J.D. & Bryan A. Liang, M.D., Ph.D., J.D., *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285 (2004) 12

INTEREST OF THE AMICUS

The Advocates for Human Rights is a nongovernmental, nonprofit organization dedicated to the promotion and protection of human rights. Founded in 1983, The Advocates for Human Rights has more than 800 volunteers who document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations.

The Advocates organized its Death Penalty Project in 1991 to recruit attorneys to assist death row inmates with their post-conviction appeals. The Advocates' volunteers have provided pro bono representation to dozens of death row inmates in several states and submitted amicus curiae briefs in numerous cases.[1]

The Advocates for Human Rights has a strong interest in ensuring that the mentally retarded are not executed.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the amicus certify that no counsel for a party authored any part of this brief, and no person or entity other than counsel for the amicus has made a monetary contribution to the preparation or submission of this brief The parties were notified ten days prior to the due date of this brief of the intention to file The parties' consents have been filed.

SUMMARY OF ARGUMENT

In violation of the Eighth Amendment and this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), the government is poised to execute a man who is mentally retarded. This execution would occur despite the fact that new evidence now proves that Petitioner is mentally retarded and categorically excluded from the death penalty. That new evidence establishes that the Social Security Administration administered IQ and adaptive functioning tests to Petitioner before he committed the crimes in question and that his post-conviction IQ tests were not "faked."

Moreover, it directly impeaches the government's witnesses at the sentencing hearing and the initial habeas proceeding by proving that Petitioner's adaptive functioning level is that of a young child and that school officials had placed Petitioner in special education classes. This new evidence is so compelling that the concurring opinion below concluded that a finding of mental retardation would be "virtually guaranteed" if considered on the merits.

Nonetheless, the Fifth Circuit denied Petitioner's attempt to have the district court consider this newly discovered evidence, concluding that 28 U.S.C. § 2255(h)(1) of the Antiterrorism and Effective Death Penalty Act ("AEPDA") bars Petitioner from filing a "second or successive" application for a habeas writ raising issues with respect to his mental retardation. It ruled that Petitioner had already litigated his mental retardation claim in his "first" habeas proceeding and that any later effort to prove his claim using newly discovered evidence would be a "second or successive" application that AEDPA bars. This ruling – which the concurrence termed "Kafkaesque" – unconstitutionally sanctioned the denials of the Due Process, Eighth Amendment, Suspension Clause, and 18 U.S.C. § 3596 protections afforded to Petitioner.

This brief addresses the reasons the Petitioner's application for leave to prove his mental retardation in light of the newly obtained evidence is not a prohibited "second or successive" application and why that conclusion is supported both by this Court's prior habeas rulings and the need to avoid a patently unconstitutional execution.

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ARGUMENT

When the Court held that it is unconstitutional to execute a mentally retarded person, it based its holding in part on the fact that mentally retarded persons cannot, as a result of their disability, act with the level of moral culpability necessary to impose the death penalty.[2] *Atkins*, *supra*, 306. "Because of their

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[2] The term "mentally retarded" or "mental retardation" is no longer the term used by mental health professionals; instead, the preferred term is "person with an intellectual disability" or "person with a developmental disability." *See* Am. Ass'n on Intellectual & Developmental Disabilities, *FAQ on Intellectual Disability – Is intellectual disability the same as mental retardation?*

(Continued on following page)

disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 306. All mentally retarded persons are therefore categorically excluded from the death penalty.

Many of the characteristics of mental retardation that led the Court to its holding also affect a defendant's ability to show that he or she is mentally retarded. As a result, a defendant's mental retardation often goes undetected until after trial or later. Unlike the evidence in a typical habeas claim, critical evidence of mental retardation does not decay over time. In addition, the relief sought by a capital defendant claiming mental retardation – commutation to a life sentence – is far less drastic than the relief sought by a typical habeas petitioner – a new trial on both guilt and punishment.

Despite these reasons for excluding the mentally retarded from a capital sentence, the Fifth Circuit

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Why do programs still say mental retardation?, http://www.aamr.org/content_104.cfm. Indeed, the American Association on Mental Retardation, whose definition of "mental retardation" was quoted by *Atkins*, changed its name to the American Association on Intellectual and Developmental Disabilities ("AAIDD") in 2006. *See* Am. Ass'n on Intellectual & Developmental Disabilities, *World's Oldest Organization on Intellectual Disability Has a Progressive New Name* (Nov. 2, 2006), http://www aamr.org/content_1314 cfm. Because much of the relevant authority and case law uses the earlier terminology, however, this amicus brief uses that terminology as well.

held that Petitioner could not bring a second habeas petition showing that he is mentally retarded – even though, as the court noted, Petitioner had recently discovered clear and convincing evidence in the possession of the government that he was mentally retarded and that his execution would be unconstitutional.

The Court should not sanction the unconstitutional execution of a mentally retarded person, and should allow Petitioner the opportunity to show that he is mentally retarded and categorically excluded from the death penalty.

I. A capital defendant's mental retardation may not be immediately recognized by lawyers and the courts.

A. Mentally retarded persons have limited capacities to understand the importance of their disability to their defense or communicate regarding their disability to defense counsel or the court.

The Court declared in *Atkins* that a defendant's mental retardation "can jeopardize the reliability and fairness of capital proceedings" because it incapacitates that defendant from providing the same level of assistance to the defense as other defendants. *Atkins*, *supra*, 306-07, 318.[3] "Mentally retarded defendants

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[3] In *Atkins*, the Court quoted the 1992 definition of mental retardation by the AAIDD. In 2002, the AAIDD updated the

(Continued on following page)

may be less able to give meaningful assistance to their counsel" because they "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[4] *Id.* at 318, 320-21 (citing J. McGee & F. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in The Criminal Justice System and Mental Retardation 55, 58-60 (R. Conley, R. Luckasson, & G. Bouthilet eds. 1992); Appelbaum & Appelbaum, *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 14 J. of Psychiatry & L. 483, 487-89 (Winter 1994)).

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definition to recognize that the ten specific examples of adaptive skills listed in the 1992 definition fall into three groups of cognitive, social, and practical skills Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing Atkins v Virginia. How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases*, 41 U RICH. L. REV. 811, 820 (2007) [hereinafter *Challenge*]. The AAIDD now defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social and practical adaptive skills. The disability originates before age 18" Am. Ass'n on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support*, 5 (Ruth A. Luckasson et al., eds., 10th ed. 2002)

[4] Not only are mentally retarded defendants less likely to assist in their defense, they also have a greater tendency to make false confessions. *See Atkins*, 321 n 25 (noting that mentally retarded persons have a higher risk of making a false confession) (citing Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense*, Washington Post, Jan. 15, 1994, p. A1)

Ironically, the disability itself makes it difficult for a mentally retarded defendant to understand the relevance of that disability in capital proceedings. Mental retardation also hinders defendants' ability to communicate the fact of their mental retardation to defense counsel or the court. They also may not be able to understand that, if they are convicted of a capital crime, their mental retardation would literally mean the difference between life and death.

B. Mentally retarded persons typically hide their disability from others.

This problem is compounded by the fact that mentally retarded persons typically attempt to hide their disability from others – even defense counsel in capital proceedings. Persons with mental retardation typically attempt to conceal the fact that they are mentally retarded behind a "mask" or a "cloak of competence" in order to appear that they are more competent than they are. *See* Denis W. Keyes, William J. Edwards & Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 MENTAL & PHYSICAL DISABILITY L. REV. 529, 530 (1998) [hereinafter *Invisible Defendant*] ("It is rarely considered by lawyers and judges that people with mental retardation will attempt to hide their disability."); *see also* LaJuana Davis, *Intelligence Testing and Atkins: Considerations for Appellate Courts and Appellate Lawyer*, 5 J. APP. PRAC. & PROCESS 297, 305 (Fall 2003) [hereinafter *Intelligence Testing*]; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants, in Symposium on the ABA Criminal Justice Mental*

Health Standards, 53 GEO. WASH. L. REV. 414, 430-32 (1985) [hereinafter *Symposium*]; Rebecca J. Covarrubias, *Lives in Defense Counsel's Hands: The Problems and Responsibilities of Defense Counsel Representing Mentally Ill or Mentally Retarded Capital Defendants*, SCHOLAR: ST. MARY'S LAW REVIEW ON MINORITY ISSUES, 11 SCHOLAR 413, 440-42 (Spring 2009); Jamie Fellner, *Beyond Reason: Executing Persons with Mental Retardation*, 28 HUM. RTS. 9, 11 (2001), *available at* http://www.abanet.org/irr/hr/summer01/fellner.html ("Many people who have cognitive impairments go to great lengths to mask them, wrapping themselves in a 'cloak of competence.'"); Diane Courselle, Mark Watt & Donna Sheen, *Suspects, Defendants, and Offenders with Mental Retardation in Wyoming*, 1 WYO. L. REV. 1, 23 (2001) (stating that the mentally retarded will use a cloak of competency to try to appear more competent than they are).

Mentally retarded persons try to hide their disability because they are aware of the social stigma and want to avoid being labeled as mentally retarded. *Invisible Defendant*, 530. In addition, mentally retarded persons may try to hide the fact of their disability because they are afraid others will then attempt to take advantage of them. *See Invisible Defendant*, 530; *Intelligence Testing*, 305 ("masking can be an understandable response to a sometimes dangerous and exploitative world").

Of course, a mentally retarded capital defendant who engages in the typical behavior of trying to hide his or her disability is acting against his or her self interest, and is effectively "cheating to lose," because the defendant with mental retardation deflects attention from his or her disability rather than bringing it to the attention of defense counsel or the court. *See Invisible Defendant*, 530; *Intelligence Testing*, 305-06.

C. Most mentally retarded persons have some life skills, making it difficult for defense counsel or the court to recognize their disability.

Most mentally retarded persons – eighty-five percent – have IQs in the range of 55 to 75.[5] Am. Psych. Assn., *Diagnostic and Statistical Manual of Mental Disorders-Text Revision*, 43 (4th ed., Am. Psych. Press 2000) [hereinafter *DSM-IV-TR*]. These individuals require the least assistance and are most likely to have some life skills and have engaged in some "normal life" activities.[6] *See Intelligence Testing*, 304; *Invisible Defendant*, 530.

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[5] It is estimated that only three percent of the general population is mentally retarded *See Invisible Defendant*, 530 (noting that compared to their age peers, an individual with mental retardation scores lower than 97 percent of the general population on IQ tests).

[6] As such, these individuals present the greatest obstacle to lawyers, the criminal justice system, and even their own defense, because they are most likely to avoid being recognized as mentally retarded. *See Invisible Defendant*, 530; *see also Intelligence Testing*, 303.

Persons with mental retardation "may, with appropriate training and opportunities, develop good adaptive skills in other domains." *DSM-IV-TR*, 47; *see also Intelligence Testing*, 305 (citing same). Thus, the fact that a mentally retarded person has some strengths or life skills does not mean that the person is not mentally retarded. *Intelligence Testing*, 305. Further, the appearance of a particular person's ability to function in a life skill area does not necessarily mean that he or she has complete command of that skill or has mastered the necessary related skills. *Intelligence Testing*, 305.

Although the criminal justice system today has a better understanding of mental retardation than it did when *Atkins* was decided, many court decisions up to and shortly after *Atkins* relied on an outmoded and inaccurate belief regarding mental retardation. Courts often found that a defendant was not mentally retarded because the defendant had some life skills or engaged in certain areas of "normal" life, such as obtaining a GED, having a job, or getting married. *See, e.g.*, *Emmett v. Commonwealth*, 569 S.E.2d 39, 47 (Va. 2002); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 56 n.8 (Va. 2002); *Ex Parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002); *see also Intelligence Testing*, 305 n.56-58 (citing same).

Mental retardation is, however, "always a severe disability." *Invisible Defendant*, 532. In the years since *Atkins*, the criminal justice system has become far better educated regarding mental retardation. Lawyers and judges are more likely to understand that the mere ability to perform some life task does not mean that the person is not mentally retarded.

Here, Petitioner has never had an evidentiary hearing on the issue of mental retardation based on the newly discovered evidence or the understanding of mental retardation that has developed since *Atkins*.

II. Habeas cases involving a categorical exclusion from the death penalty for mental retardation do not present the judicial and administrative concerns present in typical habeas cases.

Habeas cases involving a categorical exclusion from the death penalty for mental retardation are different from the typical death penalty habeas case. Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 331 (2009-2010) [hereinafter *Death Ineligibility*]. They arise under different circumstances that are unique to that group of defendants, and their cases do not present the same judicial or administrative concerns involved in second or successive petitions from the typical death penalty case. Consequently, habeas cases involving a categorical exclusion from the death penalty for mental retardation should be treated differently from the typical habeas case.

A. Critical evidence of mental retardation does not decay and may improve over time.

One area in which cases involving mental retardation as a categorical exclusion from the death penalty are different from the typical habeas case is that critical evidence regarding whether the defendant is mentally retarded does not deteriorate over time. *Death Ineligibility*, 349. Such evidence of mental retardation often includes school records, medical records, and other state and federal agency records that are highly reliable. *Death Ineligibility*, 362. School records may reflect that a defendant was doing poorly in school or was enrolled in special education classes. *Death Ineligibility*, 362. Many health care records and measures will (or should) contain information addressing mental health issues, level of intelligence and adaptive behavior. *See* Victor R. Scarano, M.D., J.D. & Bryan A. Liang, M.D., Ph.D., J.D., *Mental Retardation and Criminal Justice: Atkins, the Mentally Retarded, and Psychiatric Methods for the Criminal Defense Attorney*, 4 HOUS. J. HEALTH L. & POL'Y 285, 293-94 (2004) (citing *Child and Adolescent Psychiatry: A Comprehensive Textbook*, 1-9, 374-82, 989-1005 (Melvin Lewis ed., 2d ed. 1996)). Medical records may show that a defendant has a hereditary or genetic impairment, such as Down's syndrome, or that a defendant suffered from alterations of the embryonic environment or pregnancy or perinatal problems. *Id.*

The results of IQ tests are another important piece of evidence in assessing whether a defendant is mentally retarded. *Death Ineligibility*, 362. IQ tests, regardless of whether they were administered before or after the crime took place, may yield valuable information regarding whether a defendant is mentally retarded. Moreover, as the relevant psychological and medical fields advance, IQ testing and evaluation of mental retardation of a defendant are likely to improve and become more accurate. *See Death Ineligibility*, 362; *Challenge*, 854-55.

School and medical records, similar to a previously-administered IQ test, are not subject to evidentiary decay in the same way as evidence in the typical habeas case. For instance, a petitioner in a typical habeas case may raise a claim of illegal search and seizure, or failure to give *Miranda* warnings. In those cases, Congress may have justifiably been concerned about a police officer's ability to remember what he or she said or did. *See Death Ineligibility*, 361-62 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970)).

In contrast to typical habeas cases, much of the critical evidence in a mental retardation case – school or health records, government agency records, IQ test results – does not depend on or consist of witnesses or their recollections.[7] The defendant and the government in that case would have the same ability to present and rebut that evidence regardless of whether that evidence was produced before trial or long afterward.

B. A capital defendant seeking to establish that he is mentally retarded requests the relief of an evidentiary hearing and a commuted sentence – not a whole new trial and release.

A defendant seeking to establish that he or she is mentally retarded and categorically excluded from the death penalty, however, does not request a whole new trial. At most, the defendant seeks an evidentiary hearing to address the mental retardation claim based upon objective evidence. *See Death Ineligibility*, 363. Further, if the defendant fully prevails on his mental retardation claim, the relief is limited to commuting the death sentence to life in prison. *See Death Ineligibility*, 363.

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[7] Any concern that a capital defendant might engage in "sandbagging" by withholding potentially meritorious habeas claims would not apply to claims of mental retardation. *See Death Ineligibility*, 362 (citing *Collateral Attack*, 157-59). A mentally retarded defendant has no incentive to withhold the claim and the evidence of mental retardation does not decay over time. *See Death Ineligibility*, 363.

C. A defendant's challenge to imposition of the death penalty on the basis of mental retardation is a substantive challenge to availability of the death penalty – not a procedural challenge to alleged errors in the original proceeding.

The typical habeas case often turns on alleged procedural violations that may not have affected the outcome of the original proceeding and that have little to any impact on the guilt of the offender. *See Death Ineligibility*, 364.

In contrast, a capital defendant seeking to establish ineligibility for the death penalty because of mental retardation is not bringing a procedural challenge, but is instead challenging a substantive prerequisite for the imposition of the death penalty. *See Death Ineligibility*, 364 (noting that "ineligibility challenges are not procedural").

III. The Fifth Circuit's overly narrow reading of AEDPA undermines *Atkins*, because it would bar petitions based on the same reasons that this Court held warranted categorical exclusion of mentally retarded defendants from the death penalty.

The Fifth Circuit's overly narrow reading of AEDPA undermines *Atkins*, because it would bar petitions based on the very characteristics of mental retardation that this Court held warranted categorical exclusion of mentally retarded defendants from the death penalty. Congress surely did not intend such a result, and the Constitution does not sanction it.

For mentally retarded defendants, their diminished capacities to understand or communicate may result in their disability going unrecognized, or in key evidence of the disability going uncovered, until later. *See supra* Section I. Here, although evidence of Petitioner's mental retardation was presented earlier, the addition of the newly discovered evidence now renders a finding of mental retardation "virtually guaranteed," according to the concurrence below. Given the effect of mental retardation on the ability to raise a defense and uncover key evidence, a petitioner should not be barred from bringing a petition to show that he is mentally retarded and therefore categorically excluded from the death penalty.

IV. Executing Petitioner would result in an unconstitutional suspension of the writ of habeas corpus.

The suspension clause states that the "privilege of the Writ of Habeas Corpus shall not be suspended unless when in the case of rebellion or invasion the public safety may require it." U.S. Const., art. 1, § 9, cl. 2.

In *Immigration and Naturalization Services v. St. Cyr*, 533 U.S. 289 (2001), this Court considered the procedural effect of the Immigration and Naturalization Act of 1996 on the availability of habeas corpus jurisdiction for a permanent resident alien who had filed a petition seeking review of a decision from a Board of Immigration Appeals. The District Court and Court of Appeals agreed that it had jurisdiction to hear the petition. The INS argued that the 1996 Act stripped the courts of jurisdiction to hear the petition. This Court affirmed, relying on canons of statutory construction:

> First, as a general matter when a particular interpretation of a statute invokes the outer limit of Congress's power, we expect a clear indication that Congress intended that result. Second, if an otherwise acceptable construction of a statute would raise serious constitutional problems and where an alternative interpretation of the statute is "fairly possible," we are obligated to construe the statute to avoid such problems.

Id. at 300 (internal citations omitted).

In *Felker v. Turpin*, 518 U.S. 651 (1996) the petitioner requested a new trial based on *Brady* violations, ineffective assistance of counsel, and related issues. There was no claim that the petitioner was constitutionally ineligible for execution. This Court denied the petition in *Felker*, holding that the restrictions on successive of habeas corpus petitions did not amount to an unconstitutional suspension of the Writ. The Court noted that AEDPA was part of "an evolving body of equitable principles informed and controlled by historical usage, statutory developments and judicial decision." *Id.* at 664 (citing

McCleskey v. Zant, 499 U.S. 467 (1991)). In denying the petition, this Court held:

> The added restrictions which the Act places on the second habeas petitions are well within the compass of this evolutionary process and we hold that they do not amount to a "suspension of the Writ" contrary to Article 1, § 9.

Id. at 665; *see also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) ("Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to innocence of the capital crime itself a showing that there was no aggravating circumstance or that *some other condition of eligibility had not been met.*") (emphasis added). So the issue remains: Whether, as applied, the AEDPA restrictions cited by the Fifth Circuit barring Petitioner's successive petition amount to a suspension of the Writ contrary to Article 1, § 9.

Here, executing a petitioner who, by the government's own records, is mentally retarded, allows Congress to effect an unconstitutional suspension of habeas corpus. It is therefore reasonable to construe the statute assuming that Congress intended to preserve habeas corpus jurisdiction in cases where a successive Petition would prevent an unconstitutional execution. Otherwise, as exemplified by the Fifth Circuit's reasoning, the courts cede to Congress the power to allow an execution categorically prohibited by the Constitution.

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CONCLUSION

Post-*Atkins* developments in understanding mental retardation show that it is often hidden, through no fault of the defendant, in capital proceedings. This reality, unique to mental retardation cases, makes the result below – denial of a successive petition where the evidence of mental retardation lay in the government's own hand – unconscionable and unconstitutional, as the concurrence below noted. This reality warrants grant of certiorari so that this Court can address the denial by the Fifth Circuit Court of Appeals of Petitioner's Motion for Authorization to File a Successive 28 U.S.C. § 2255 Motion. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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